TRANSCRIPT OF RECORD.

13

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. [redacted]253.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

FILED SEPTEMBER 14, 1908.

(21,331.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1908.

a In the Circuit Court of the United States for the Eastern District of Oklahoma.

Pleas and proceedings before the Honorable Ralph E. Campbell, Judge of the District Court of the United States, presiding in the Circuit Court in case of—

Equity. No. 271.

J. E. FLEMING ET AL.
vs.
GREEN MCCURTAIN ET AL.

1 In the United States Circuit Court, Eighth Circuit, Eastern District of Oklahoma.

J. E. FLEMING, Complainant,
vs.
GREEN MCCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD, J. F. MCMURRAY, MELVIN CORNISH, Co-partners Doing Business under the Firm Name and Style of Mansfield, McMurray and Cornish, and JAMES R. GARFIELD, Secretary of the Department of the Interior of the United States, Defendants.

Petition in Equity.

Complainant for himself and for and on behalf of Annie Huff (and about thirteen thousand other persons enumerated by name in the Bill of Complaint filed here, but whose names are omitted
2 from the printing of this record), all persons of Choctaw or Chickasaw Indian blood and descent and members of a designated class of persons for whose exclusive use and benefit a special grant was made by letters patent from the President of the United States on February 23, 1842, of certain property, hereinafter more fully described and situated in the now State of Oklahoma, in fee simple to the Choctaw Nation to be held in trust, complains against the defendants, Green McCurtain and Douglas H. Johnston, residents of the Choctaw and Chickasaw Nations, respectively, and citizens of the State of Oklahoma and of the United States of America, and against all persons whose names appear on the rolls of "citizens" of the Choctaw and Chickasaw Nations or Tribes with the names of the said Green McCurtain and Douglas H. Johnston, respectively, and all persons whose names appear upon the "freedmen" rolls of said Nations or Tribes as approved by the Secretary of the Interior on or before March 4, 1907; and against the defendants George Mansfield, J. F. McMurray and Melvin Cornish, co-partners and doing business under the firm name and style of Mansfield, McMurray and Cornish, resident of the town of McAlester, Choctaw Nation, and citizens of the State of Oklahoma and of the United

States of America; and against the defendant James R. Garfield, Secretary of the Department of the Interior of the United States, resident of the City of Washington, District of Columbia, and a citizen of the United States of America, who is sued herein in his official capacity as Secretary of the Interior; and petition this court to exercise its equity powers in determining and protecting their lawful rights.

Complainant represents to this court and complains as follows:

I.

3 That by Article Two of a treaty with the Choctaws negotiated on September 27, 1830, and proclaimed as a law February 24, 1831, and commonly known as the Choctaw Treaty of Dancing Rabbit Creek, it was stipulated and agreed that upon the ratification of said treaty the United States, by a grant specially to be made by the President thereof, should cause to be conveyed in fee simple title to the Choctaw Nation a tract of country west of the Mississippi River bounded as follows: Beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning; to be held by said Choctaw Nation in trust for the exclusive use and benefit of a designated class of persons consisting of all those persons who were members of the Choctaw community of Indians on the day the treaty was ratified, to-wit, February 24, 1831, and their descendants; that it was further provided by said article of said treaty that the fee to said property to be specially conveyed by the President of the United States to the Choctaw Nation in trust should continue to be held by said nation in trust and continue to inure to the benefit of all such persons so long as said designated class of persons should maintain a national tribal existence and live on the land, and that upon the happening of either of these contingencies the fee should no longer be held in trust and inure but should pass to and vest in the then living beneficiaries under the trust. (7 Stats. L. 333.)

II.

4 That thereafter, and on to-wit, March 24, 1837, the Senate of the United States ratified a treaty, entered into by the Choctaws and Chickasaws on January 27, 1837, by the terms and provisions of Article one of which treaty those persons comprising the Chickasaw community on the day of the said treaty was ratified, and their descendants acquired by purchase an equal, undivided, individual interest in the trust property agreed to be conveyed to the Choctaws by Article 2 of the treaty of 1830, on the same terms that the Choctaws held it, and that by this treaty the Chickasaws became a part of the designated class of Choctaws for whose exclusive use and benefit the grant was to be made.

III.

That on March 23, 1842, the President of the United States specially conveyed by letters patent the property agreed to be specially conveyed by Article 2 of the said treaty of Dancing Rabbit Creek, and therein described by metes and bounds, to the Choctaw Nation in fee simple title to be held by said Nation in trust for the exclusive use and benefit of the said designated class of persons described in Article 2 of said treaty.

IV.

That complainant knows of his own personal knowledge that he, as well as many of the persons for whose benefit this suit is brought and herein made complainants, are of the designated class of persons for whose exclusive use and benefit the said grant was made, and complainant is reliably informed and verily believes and therefore alleges upon information and belief, that each and every person for whose benefit this suit is brought and herein made complainants, is a member of said designated class of persons.

V.

That all of the allotted and unallotted lands embraced within the geographical limits of the Choctaw and Chickasaw Nations were acquired in fee simple title under and by virtue of said treaty of Dancing Rabbit Creek, and all the moneys or other things of value now held by either the Choctaw or Chickasaw Nations, or by the Government of the United States, or by any other officer, agent, or employee thereof, for the Choctaws or Chickasaws, were either a part of, or have resulted from, the property acquired under and by virtue of said treaty.

VI.

That as one of the designated class of persons for whose exclusive use and benefit said grant was made, complainant, as well as each and every person for whose benefit this suit is brought and herein made complainants, has at all times, since his or their birth, been vested with an indefeasible title to an undivided, individual interest in all the property, both lands and moneys, which was a part of, or which has resulted from said grant.

VII.

That during the year 1892, representations were made to the officials of the Government of the United States that the greater portion of the common trust property of the Choctaws and Chickasaws was being held by a few individuals to the exclusion of the great majority of the lawful beneficiaries under the trust; that the Senate of the United States, on March 29, 1894, adopted a resolution authorizing and directing a select Committee thereof to investigate the conditions existing in the said Choctaw and Chickasaw Nations and to report to the Senate the true conditions existing; that a Com-

mittee was duly appointed, composed of men of well known legal ability and with peculiar knowledge of Indian affairs, which Committee visited the Choctaw and Chickasaw Nations and reported to the Senate on May 7, 1894, that the property of the Choctaws and Chickasaws was held by the tribes in trust for the benefit of all the Choctaw and Chickasaw people under treaty agreements; that the great majority of the property was being held by a few individuals to the exclusion of the great majority of the legal beneficiaries under the treaties, and that it was the duty of the government to see
6 to it that this trust property was administered according to the plain terms of the trust.

VIII.

That by an Act approved March 3, 1893, a Commission was created to negotiate with the Choctaw and Chickasaw people for the sale of all or any part of their lands, or for the division of the same among the members thereof in severalty upon a basis of justice and equity; that said Commission failed to secure such an agreement with the Choctaws and Chickasaws; that thereafter Congress passed another Act which was approved March 2, 1895, extending the life of the said Commission, created under the Act approved March 3, 1893, and therein directed the members thereof to continue negotiations with the Choctaws and Chickasaws as directed by the Act creating said Commission; that said Commission failed under this latter Act to secure any agreement with the Choctaw and Chickasaw people.

IX.

That by an Act approved June 10, 1896, said Commission was continued in existence and directed to place the names of all persons on the "citizenship rolls" of said tribes, who applied to said Commission for enrollment within three months after the passage of said Act, and who were entitled to such enrollment under the treaties with said tribes; that only a comparatively few of the legal beneficiaries applied to said Commission under said Act; that thereafter another Act was approved June 7, 1897, which provided for the confirmation of certain rolls therein described, but as no such rolls existed of the Choctaws and Chickasaws said Act was ineffective; that thereafter Congress passed another Act approved June 28, 1898, giving the said Commission all necessary power to compel all persons having any rights in the common property of the
7 Choctaws and Chickasaws to appear before said Commission for examination under oath, and specially directed said Commission to prepare correct and complete "rolls of citizenship" and "rolls of Freedmen" of said tribes, and that when correct and complete rolls had been prepared embracing the names of all the legal beneficiaries in the trust property who were *bona fide* residents of said Nations on June 28, 1898, the day said Act was approved, and that when said rolls were so made and were approved by the Secretary of the Interior they should be final; that Section 21 of said Act expressly directed said Commission and said Secretary to enroll on

the "citizenship rolls" all persons of Choctaw or Chickasaw Indian blood and descent who were residents as aforesaid; that said Commission was further directed to make a correct roll of all Choctaw "freedmen" entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty of 1866; that said Commission was further directed by said Act to make a correct roll of all Chickasaw "freedmen" entitled to any rights or benefits under the treaty of 1866, and their descendants born to them since the date of the said treaty, and to allot forty acres of the average allotable common lands of the Choctaws and Chickasaws to each such person enrolled as a "Chickasaw freedman"; that the said Act then provided that when the "rolls of citizenship" and "freedmen rolls" were made as therein provided, and were approved by the Secretary of the Interior, they should be final.

X.

That by agreements negotiated by certain persons appointed by the authorities of the Choctaw and Chickasaw Nations, to represent said Nations, and members of the said Commission, representing the United States Government, and which agreements were ratified by the Congress of the United States and approved by the President thereof on June 28, 1898, and on July 1, 1902, respectively, and thereafter ratified by a majority of all adult male persons (many of whom were intermarried and adopted white persons) exercising "political" rights as "citizens" of said Nations, it was stipulated and agreed, among other things, that all of the common property resulting from said grant specially made in 1842, should be divided among the persons whose names lawfully appeared on said "citizenship" and "freedmen" rolls, and that said rolls should be made in strict compliance with the provisions of Section 21 of the Act approved June 28, 1898, and more fully described in specification eight; that by the terms and provisions of said agreements, it was provided, among other things, that each person, whose name lawfully appeared on said "citizenship rolls, thereafter to be prepared, might select as his or her share of the said common lands, land equal to 320 acres of the average allotable lands of said tribes, and that every such person should have a prior right to select lands upon which he or she had existing improvements, and the lands so selected should be allotted to such person by said Secretary; that each "freedman" lawfully enrolled might select as his or her share of the said common lands, land equal to 40 acres of the average allotable lands, and that every such person should have a prior right to select land upon which he or she had existing improvements, and that the land so selected should be allotted to such person by the said Secretary; that upon allotments being made to such persons whose names appeared on the "citizenship" rolls of said tribes, there should be paid to every such person the sum of $75 from moneys derived from the sale of townsits property in said Nations, and that upon allotments being made to all persons enrolled as "citizens" and "freedmen" of the said Nations the residue of all the common property should be sold and the money derived therefrom as well as all the

moneys held in trust for the Choctaws and Chickasaws should
9 be distributed among the persons, share and share alike,
whose names lawfully appeared on the said "citizenship" roll
of said Nations.

XI.

Complainant represents that a majority of those persons for whose benefit this suit is brought were *bona fide* residents of the Choctaw or Chickasaw Nations, on the 28th day of June, 1898, but that some of the persons herein were not residents of said Nations on said date, but that they are nevertheless entitled to share in said common property because they are of the designated class for whose exclusive use and benefit the grant was made; that therefore so much of the Act of Congress approved June 28, 1898, as prohibited the enrollment of any person who was a member of said designated class of persons because said person was not a *bona fide* resident of said Nations on the day said Act was approved, as well as the agreement approved July 1, 1902, prohibiting the distribution of any share of said property to any person so situated was unconstitutional, null and void; that both agreements approved June 28, 1898, and July 1, 1902, were unconstitutional, null and void, because they were not approved by the said designated class of persons or by a majority of said designated class of persons; that no one but adult males were permitted to participate in the elections at which said pretended agreements were claimed to have been ratified, whereas the property belonged as much to the women and minor children as it did to the adult males and no valid agreement could have been entered into without their approval and consent; that at said elections several thousand persons who had been adopted, or who had intermarried, into said tribes and who had thereby acquired civil and political rights, but who were not of the said designated class of persons for whose exclusive use said grant was made, and therefore had no lawful interest in said property, were permitted to vote in said elections, which resulted in the alleged ratification of said agreements, and that
10 it was by reason of the votes of said intermarried and adopted
persons that said agreements were apparently ratified; that no person, not even a male adult, who was a member of said designated class of persons was permitted to vote in said elections unless he had theretofore been recognized by the tribal authorities and enrolled on one of the tribal rolls prepared by persons pecuniarily interested in the division of the tribal property and was at the time of said elections a *bona fide* resident of said Nations; that said pretended agreements were never approved by complainants, were never in truth and fact, or in law ratified by a majority of the lawful owners of said property and are therefore unconstitutional, null and void.

XII.

That by the Act approved June 10, 1896, appeals were provided for from the decisions of the said Commission in all "citizenship" cases coming before the said Commission under said Act, to the United States District Courts in the then Indian Territory; that

appeals were taken under the provisions of the said Act in cases involving the rights of about five thousand persons to "citizenship" in the said Choctaw and Chickasaw Nations; that said cases were heard and determined by the said United States District Courts and judgments were rendered in favor of about four thousand claimants entitling them to have their names placed upon the "citizenship" rolls of the said Nations; that said judgments rendered by the United States District Courts were carefully examined by members of a firm of attorneys doing business under the firm name and style of Mansfield, McMurray & Cornish, with offices at McAlester, Choctaw Nation, and which attorneys were employed by and represented the Choctaw and Chickasaw Nations; that said examination resulted in establishing the fact that about 140 names of persons had
11 been erroneously or fraudulently included in said judgments; that said fact was called to the attention of said District Courts and said names erroneously or fraudulently included in said judgments were stricken from said judgments; that on June 28, 1898, another Act was approved authorizing appeals to the Supreme Court of the United States from judgments rendered in said "citizenship" cases by the said United States District Courts; that many of said cases were appealed to the United States Supreme Court and there consolidated and heard as one case, and on May 15, 1899, judgment was rendered by the Supreme Court affirming the constitutionality of the legislation under which the appeals had been taken to the United States District Courts and the regularity and validity of said judgments therein rendered; that thereafer, and, on to-wit, January 17, 1901, the Chocatw and Chickasaw Nations through their Principal Chief and Governor, respectively, entered into an inchoate contract at Sherman, Texas, with George Mansfield, J. F. McMurray, and Melvin Cornish, who were then associated together in the practice of law and doing business under the firm name and style of Mansfield, McMurray & Cornish, with offices at McAlester, Choctaw Nation, and who then represented the Choctaw and Chickasaw Nations as attorneys, receiving therefor an annual salary of $10,000 and allowances for expenses aggregating about $5,000 per annum; that by said inchoate contract said attorneys agreed to prevent the said persons whose names were included in the said judgments of the United States District Courts from receiving any portion of the common property now in controversy; that it was agreed by and between the contracting parties that the individual shares in the said property should be $4,800, and that the said firm of attorneys should receive nine per cent. of said amount for each person who had theretofore been decreed entitled to enrollment as a "citizen" of said Nations by the United States Courts, and who was deprived of the right to share in the common property of the Choctaws and Chickasaws as a result of their
12 efforts; that said attorneys went to Washington and made false and fraudulent representations to the Committees of Congress, and to the individual members thereof, with reference to said judgments; that Congress acting upon said false and fraudulent representations included a provision, drafted by the said attorneys or someone representing them, in an Act which was approved

July 1, 1902, providing among other things for the creation of a Legislative Commission to be known as the "Choctaw-Chickasaw Citizenship Court"; that said Commission was composed of three members who were appointed by the President and confirmed by the Senate of the United States, by name, Spencer B. Adams, Walter L. Weaver, and Henry S. Foote; that said Commission was authorized to pass upon two questions of law which had been previously determined by the United States District Courts in the Indian Territory and their decisions thereon affirmed by the Supreme Court of the United States; that it was provided in said Acts that if the said Legislative Commission found that the said courts had erred in determining these two questions of law, that said Commission should render a finding and decree to that effect and that said finding and decree should operate to vacate and annul all the judgments rendered by the United States District Courts in favor of said persons as citizens of the said Choctaw and Chickasaw Nations, and that said Court should then proceed to try *de novo* all of such cases thereafter brought before it for consideration and decision; that said court rendered a finding and decree which, under the provisions of said Act, rendered void all the judgments entered in all said cases by the said United States Courts; that thereafter cases involving the rights of 3304 persons were brought before said Court for consideration and determination; that all said persons included in said cases, with the exception of 156 persons, were denied enrollment as citizens of said Nations by findings made and decrees entered by said
13 Legislative Commission; that said attorneys thereafter secured the incorporation of a provision in an Act of Congress approved March 3, 1903, authorizing the said Legislative Commission, upon final determination of the cases coming within its jurisdiction, to fix reasonable compensation for said attorneys under the said inchoate contract dated January 17, 1901; that upon the rendition of all decrees by the said Legislative Commission, the said Commission awarded the said firm of attorneys the sum of $750,000, as a fee for services rendered in said cases, which award was certified to the Secretary of the Interior and by him certified to the Secretary of the Treasury and paid out of the trust funds of the Choctaws and Chickasaws by warrant drawn by the Treasurer of the United States on said funds; that many of the persons thus deprived of the right to enrollment as citizens of the Choctaw and Chickasaw Nations were among the designated class of persons for whose exclusive use and benefit the grant was made and are complainants herein; and the trust funds belonging to said designated class of persons, in which funds they had and have a vested right, were unlawfully paid to said attorneys for alleged services rendered before said court and Congress in this unconsci*enc*eable attempt to deprive them of their lawful property interests; that said Legislative Commission did not confine its inquiry into the rights of persons whose cases came before it for determination to the one question as to whether or not they were members of the designated class of persons mentioned in said treaty and grant, but pretended to determine the rights of said persons solely upon their rights to "citizenship" in said Nations under the laws, customs and usages of the said Nations; that complainant

is reliably informed and verily believes, and therefore alleges on information and belief, that certain members of said Legislative Court were bribed by said attorneys to render findings and decrees denying to said persons their property rights as citizens of
14 said tribes, and received as a consideration for their decisions a part of the fee of $750,000, awarded by said Court to said attorneys for alleged legal services rendered in said cases coming before said Court; that Spencer B. Adams and Henry S. Foote were the members of said Court alleged to have been bribed.

XIII.

That acting under the authority contained in the Act approved June 28, 1898, and the alleged supplemental agreement approved July 1, 1902, said Commission prepared what purported to be "rolls of citizenship" and "rolls of freedmen" of the Choctaws and Chickasaws, and on or before March 4, 1907, the time fixed by law when the jurisdiction of said Commission and said Secretary over said rolls ceased and terminated, the said Secretary approved said rolls; that said citizenship and freedmen rolls as approved by the said Secretary are not correct and complete rolls of all persons lawfully entitled to share in the common property of the Choctaws and Chickasaws, but are erroneous, spurious and fraudulent rolls, not made in conformity with the provisions of the Act approved June 28, 1898, or any other Act of Congress or any agreement or pretended agreement with the Choctaws and Chickasaws; that said rolls are erroneous in that all persons of Choctaw or Chickasaw Indian blood and descent who were *bona fide* residents of the Choctaw and Chickasaw Nations on the 28th day of June, 1898, are not enrolled on the approved citizenship rolls as is evidenced by the fact that the great majority of complainants did so reside, were before the said Commission under said Act, and all of them are of Choctaw or Chickasaw Indian blood and descent lawfully entitled to such enrollment as shown in the great majority of their cases by the records of said Commission, but were nevertheless denied enrollment as "citizens" of said Nations by said administrative officers; that said Commission and said Secretary erroneously denied the great
15 majority of complainants the right to enrollment upon the said citizenship rolls on the ground that the tribal laws, usages and customs superseded the provisions of the treaty under which the grant was made, and that notwithstanding the laws of Congress directed the enrollment on the citizenship rolls of all persons of Choctaw or Chickasaw Indian blood and descent no person could be enrolled as such whose right to enrollment was not recognized by the tribal officials, or whose name did not appear on some one of a half dozen incomplete rolls and parts of rolls of the tribes, which had never been approved or confirmed by the tribal authorities which rolls were secured from officials and ex-officials of the Indian governments, and which rolls had never been guarded or protected as public records, but were permitted at all times to be taken by any person who desired the custody of same and were altered and changed at will by the person in whose possession they

might temporarily be; that these incomplete and spurious so-called tribal rolls and parts of rolls were made by persons pecuniarily interested in the division of the trust property and that the Commission and the Secretary knew that no reliance could be placed in said alleged rolls, and parts of rolls, when said officers used same as a basis for the preparation of the said final rolls and refused complainants the right to enrollment as citizens because their names did not appear thereon; that even in cases where complainants' names did appear on said so-called rolls and parts of rolls, they were denied enrollment on the ground that they had not made an application to the said Commission for enrollment as citizens by blood under said Act approved June 28, 1898, and said application did not appear of record in the files of the Commission, notwithstanding the fact that neither the said Act of Congress or any order of the Department directed or authorized complainants, when they appeared before said Commission, to make any application, the duty of ascertaining their Indian blood and descent and making a record of same de-
16 volving wholly upon the said Commission; that between the years 1833 and 1860, inclusive, more than eighty rolls of the Choctaws and Chickasaws were made by government officers and agents and approved by the Governors of the Nations, which rolls were reasonably accurate and complete, and which rolls have, at all times since they were prepared, been in the custody of the Secretary of the Treasury and the Secretary of the Interior, or the officers of their departments, and upon which rolls appear the names of complainants and each and every person for whose benefit this suit is brought, or the names of their ancestors, and upon which rolls trust funds and other property have been distributed, and which rolls show conclusively that complainants are of the designated class of persons for whose exclusive use and benefit said grant was made and that they are of Indian blood and descent, but notwithstanding the existence of these rolls were known to the administrative officers and they were directed, by an opinion rendered by the Assistant Attorney General of the United States, under date of March 17, 1899, and which opinion was approved by the said Secretary on March 17, 1899, and thereby became a law of the Department, to enroll on the citizenship rolls all persons whose names rightfully appeared on any tribal roll and their descendants, said administrative officers did not consult or examine any of said more than eighty rolls and made no effort to secure the possession of such of said rolls as were in the custody and possession of the Secretary of the Treasury, but did in open defiance of the Act of Congress and the instructions of the Department, deny to complainants enrollment as citizens of said tribes and thereby illegally prevented complainants from receiving their lawful share of the said trust property; that said Commission was directed by an order issued by the Commissioner of Indian Affairs under date of July 25, 1899, and approved by the Secretary of the Interior, to examine all persons under oath appearing before said Commission for enrollment and to make a correct record of
17 the statements of each person so examined, so that said record could be forwarded to the Secretary when the case was pre-

sented to him for final action on review, but that said Commission did not examine all persons so appearing before it under oath and make a record of their testimony; that said Commission examined only such persons as the tribal officials denied were entitled to enrollment and made only such memorandum of their statements as the members of said Commission saw fit to make of record; that there are on the finally approved citizenship rolls of said tribes the names of several thousand white persons who were intermarried or adopted into said tribes but who were not of Choctaw or Chickasaw Indian blood and descent, are not of the designated class of persons for whose exclusive use and benefit the grant was made, and whose enrollment as citizens of said tribes was not authorized by any Act of Congress or any agreement or pretended agreement with said tribes; that said people were enrolled by findings of the administrative officers based upon tribal laws, customs and usages and not upon any treaty, grant, agreement or law of Congress; that upwards of 8,000 negroes have been enrolled as Choctaw and Chickasaw "freedmen", whose enrollment was not authorized by any treaty, grant, agreement or Act of Congress; that they were enrolled as such by the administrative officers who erroneously construed Article 3 of the treaty with the Choctaws and Chickasaws negotiated April 26, 1866, to entitle all persons of African blood and descent, who had at any time been held by the Choctaws and Chickasaws as slaves, and their descendants born prior to July 1, 1902, to be entitled to enrollment as "freedmen"; that in some of the cases of complainants herein the Commission to the Five Civilized Tribes rendered decisions holding them entitled to enrollment as citizens of said tribes, which decisions were approved by the Secretary of the Interior, but complainants' names were not placed upon the finally ap-
18 proved rolls owing to alleged lack of time on the part of the administrative officers in which to write their names on said rolls before said rolls were finally approved on March 4, 1907; that said finally approved rolls were fraudulently made by said Commission and the officers thereof in that one William O. Beall, by name, who was in charge of the Choctaw and Chickasaw enrollment division of said Commission, while actually in the employ of said Commission, did, during the month of June, 1903, leave the Commission and go to the offices of a firm of attorneys doing business under the firm name and style of Mansfield, McMurray & Cornish, and located at the town of McAlester, Choctaw Nation, and which attorneys were employed by the said Choctaw and Chickasaw Nations to oppose and prevent the enrollment on said "citizenship" and "freedmen" rolls of all persons whom the officials of said Nations did not think entitled to enrollment as "citizens" or "freedmen", and while there during the month of June, 1903, for a money consideration paid by the said firm of attorneys he prepared cases against persons claiming the right to enrollment as "citizens" of the said Choctaw and Chickasaw Nations; that in the following month of July, 1903, the said William O. Beall returned to the said Commission, and in his official capacity thereafter passed upon and adjudicated the identical cases he had previously prepared against applicants while in the employ of said firm of attorneys; that in

order to prevent a reversal of the erroneous and fraudulent decisions of said Commission by the said Secretary, parts of the records in the said cases of complainants were suppressed and held in the office of said Commission and were not transmitted with the decision of the said Commission in the respective cases to the said Secretary of the Interior; that in many cases of complainants parts of the records were taken from the files of the Commission and never returned; that in order to cover up their erroneous and fraudulent
19 action certain officers of said Commission refused to permit attorneys for complainants to inspect the records in their cases and at hearings thereon refused to receive and make a part of the record or to permit the stenographer to incorporate in the record statements of the existence of documentary evidence showing conclusively the rights of complainants; that neither the said William O. Beall, Secretary of said Commission, or Tams Bixby, the Commissioner, were lawyers or possessed of any legal learning whatsoever; that the said Beall in the first instance prepared or directed the preparation of all decisions in Choctaw or Chickasaw cases, and that the great majority of the decisions thus prepared were *pro forma* approved by the said Bixby; that many of said cases presented intricate legal questions for decision, which questions were erroneously decided by the said Beall and Bixby; that in the determination of said cases a decision was used and followed which was written by a man only a few days before he was incarcerated by order of the Supreme Court of the District of Columbia in St. Elizabeth's Insane Asylum, and thereafter died in said Insane Asylum, and which decision was *pro forma* affirmed by the Commissioner of Indian Affairs and thereafter *pro forma* affirmed by the Secretary of the Interior; that said decision related to the rights of persons to enrollment as citizens of the Cherokee Nation, where different laws governed the determination of such rights, and that notwithstanding these facts were known to the officers of the Government having special charge of the work of preparing said rolls, said decision was invoked by them and strictly adhered to in the determination of the rights of persons claiming enrollment as citizens of the Choctaw and Chickasaw Nations; that thereafter the rolls of "citizenship" and rolls of "freedmen" thus erroneously and fraudulently made up by the said Commission, were transmitted to the Secretary for his approval; that during the last week in which the Secre-
20 tary of the Interior had authority to pass upon the rights of said claimants, he acted upon 2,023 cases involving the rights of upwards of 10,000 claimants; that said Secretary did not give to said cases such consideration as was necessary to properly determine the rights of claimants and that during said week he gave no consideration in fact to said 2,023 cases whatsoever, and that the cases of many *of* complainants were among said cases decided during the week ending March 4, 1907; that on or before March 4th, 1907, the rolls of "citizenship" and rolls of "freedmen" of the said Choctaw and Chickasaw Nations were finally approved by the said Secretary; that said rolls of "citizenship" and rolls of "freedmen" are not correct and complete rolls.

XIV.

That said rolls of "citizenship" and rolls of "freedmen" approved by the said Secretary of the Interior on or before March 4th, 1907, are not correct and complete rolls of the lawful owners of the common trust property and cannot be used as a basis for the distribution of said trust property for the reason, among others, that the said trust property was conveyed in fee simple title to the Choctaw Nation to be held by said Nation in trust for the exclusive use and benefit of a designated class of persons, of which class complainants are a part; that no person not included in the said designated class has any right to share in said common trust property; that any distribution heretofore made of any of said trust property to any person or persons other than to those included in said designated class of persons, has been without authority of law and is therefore null and void.

XV.

That the Secretary of the Interior has, without authority of law, allotted, or is now allotting, or causing to be allotted, 320
21 acres of the average allotable lands in controversy to each person whose name appears on the "citizenship" rolls of the Choctaw and Chickasaw Nations as approved by him on or before March 4, 1907, and has paid, or is now paying, or causing to be paid, without authority of law, to each such person so enrolled the sum of $75 out of the trust funds derived from the sale of townsite property, which townsite property is a part of, or resulted from, said grant; and has allotted, or is now alloting, or causing to be allotted, without authority of law, to every person whose name appears on the "freedmen" rolls of said Nations, as approved by him on or before March 4, 1907, 40 acres of the average allotable lands; that of the persons so enrolled as "citizens" and who have received, and who are now receiving distributive shares of the common property as aforesaid, 2220 are intermarried persons who have no lawful right to share in said property; that many others so enrolled are adopted citizens and have no lawful right to share in said property; that 12,313 persons have been enrolled as "freedmen" and have received, or are now receiving allotments of 40 acres of land as aforesaid, who have no lawful right thereto; that the said property belonging exclusively to the designated class of persons of which class complainants are a part, is being distributed among persons who have no lawful right thereto to the exclusion of complainants and to the great, lasting and irreparable injury of all of complainants and all other rightful owners thereof.

XVI.

That the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation have issued many written instruments which purported to be patents, and which have been approved and delivered by the said Secretary of the Interior, and which issuance, approval, and delivery were without authority of law, to the persons whose names appear on said "citizenship" and "freedmen" rolls, for

lands allotted to them as aforesaid out of the common lands,
22 and which written instruments purport to pass the fee held by the Choctaw Nation, as well as all the right, title and interest of each any every person enrolled as a "citizen" of said Nations in and to the land so allotted; that the said officials of the said Nations are now issuing, and the said Secretary is now approving and delivering, without authority of law, such instruments in writing purporting to pass such title and interest to each such person who has unlawfully received an allotment and to whom no instrument in writing purporting to be a patent has been issued, and that the said officials of the said Nations will continue to issue, and the said Secretary will continue to approve and deliver without authority of law, unless restrained by order of this court, similar instruments in writing to every person so enrolled and allotted land, to the great, lasting and irreparable injury of complainant.

XVII.

That many of the persons, not of the said designated class of persons for whose exclusive use and benefit said grant was made, who have received instruments in writing purporting to be patents for the lands unlawfully allotted to them as aforesaid, are now selling said lands and purporting to pass, by deeds and other instruments of conveyance executed by them, a good and valid title approved by the Government of the United States, to the purchasers thereof, to the great, lasting and irreparable injury of complainants.

XVIII.

That on or before March 4, 1907, the said Secretary approved the enrollment as "citizens" of said Choctaw and Chickasaw Nations of many persons intermarried and adopted into said tribes; that almost immediately thereafter, the said Secretary struck from the said "citizenship" rolls, so approved by him, the names of about
23 1700 such persons; that said persons whose names were so stricken from said rolls entered into contracts with certain attorneys to secure the reinstatement of their names on said rolls and to secure for them distributive shares of said property and agreed by said contracts to pay said attorneys certain percentages of the amount of property each such person would receive; that upon the reinstatement of the names of such persons on said rolls, which has been decreed by the Supreme Court of the District of Columbia, the said Secretary will, unless restrained by order of this court, allot to every such person a distributive share of the common lands belonging exclusively to said designated class of persons and in which lands such persons reinstated on said rolls have no lawful right or interest, and will, unless restrained by order of this court, pay to each such person a distributive share of the funds derived from the sale of portions of the common trust property, which funds belong exclusively to said designated class of persons, and in which funds such persons reinstated on said rolls have no lawful right or interest; that the said Secretary has, or is about to approve under color of author-

ity, said contracts so entered into by said persons with said attorneys, and will attempt, unless restrained by order of this court, to thereby, under an Act of Congress which is unconstitutional, null and void, to make the percentage stipulated in said contracts a lien on said lands and funds, which he will wrongfully allot and pay to such enrolled persons, and will, unless restrained by order of this court, through the machinery of the Federal Government, enforce the payment of said fees, to the great, lasting and irreparable injury of complainants.

XIX.

That many of complainants are now, and have been for many years, in possession of, and are now living upon, certain lands which are a part of the common lands owned exclusively by said
24 designated class of persons, and which lands are not in excess of their lawful share thereof; that complainants have placed valuable improvements thereon which they had a lawful right to do; that the said Secretary has, without authority of law, allotted the lands so held and improved by complainants to persons whose names appear on said "citizenship" and freedmen" rolls, and has issued and delivered to said "citizens" and "freedmen" persons instruments purporting to pass to each such person a good and valid title to said land so wrongfully allotted to said "citizen" and "freedmen" persons and in which such persons have no lawful interest, and is now by physical force ejecting and dispossessing complainants of their lands so possessed and improved by them, and that the said Secretary will, unless restrained by order of this court, continue to do so, to the great, lasting and irreparable injury of complainants.

XX.

That the said Secretary is now permitting, or is about to permit, without authority of law, all persons enrolled as Choctaw or Chickasaw "freedmen" and who selected the more valuable lands of the Choctaws and Chickasaws, and thereby secured less than 40 acres of the average allotable lands, to purchase at a fictitious valuation placed upon said lands for the purposes of allotment only, and far below the actual value of said lands, sufficient land to make up allotments of 40 acres to each such person, and in which lands complainants have a vested right, and in which lands said persons so enrolled as "freedmen" have no lawful right whatsoever, and that the said Secretary will, unless restrained by order of this court, permit the said persons enrolled as aforesaid to purchase at said fictitious price, which is far below the actual value of said lands, sufficient land to make up allotments of 40 acres to each such person, contrary to law, and to the great, lasting and irreparable injury of complainants.

25 XXI.

That the Secretary of the Interior will, without authority of law, unless restrained by order of this court, immediately upon the completion of allotments to all persons whose names appear upon the

"citizenship" and "freedmen" rolls of the Choctaw and Chickasaw Nations as approved by him on or before March 4, 1907, sell and dispose of all the residue unalloted lands and other property and distribute the funds derived therefrom among those persons whose names appear on the said "citizenship" rolls, to the great, lasting and irreparable injury of complainants.

XXII.

That vast sums of the trust funds of the Choctaws and Chickasaws belonging exclusively to the members of the said designated class of persons, of which class complainants are a part, and in which funds complainants have a vested interest, have been unlawfully disbursed by Government officers; that in one instance in the year 1905, the Treasurer of the United States paid, or caused to be paid, to certain attorneys, by name, George Mansfield, J. F. McMurray and Melvin Cornish, associated together and doing business under the firm name and style of Mansfield, McMurray & Cornish, with offices at the city of McAlester, Choctaw Nation, Oklahoma, the sum of $750,000 out of the said trust funds; that said sum of $750,000 was paid to said attorneys for pretended legal services rendered in preventing the enrollment of certain persons as "citizens" of the said Choctaw and Chickasaw Nations, many of which persons were of the designated class of persons for whose exclusive use and benefit the grant was made; that said pretended services claimed to have been rendered by said attorneys were not of any direct or even remote advantage or value to the said designated class of persons who were the true and lawful owners of the said sum of $750,000 so wrongfully paid to said attorneys; that complainant has
26 recently been reliably informed and verily believes, and therefore alleges upon information and belief, that a part of this vast sum of $750,000 was distributed among the persons comprising the Legislative Commission created under the said Act of Congress approved July 1, 1902, and therein designated as the "Choctaw-Chickasaw Citizenship Court," and also that part of said sum was paid to Green McCurtain, Principal Chief of the Choctaw Nation, and that a part of said sum was paid to D. H. Johnston, Governor of the Chickasaw Nation, in which sum of $750,000 complainants had and have a vested interest, to the great, lasting and irreparable injury of complainants.

XXIII.

That complainant is reliably informed and verily believes, and therefore alleges upon information and belief, that the Principal Chief of the Choctaw Nation, Green McCurtain, and the Governor of the Chickasaw Nation, D. H. Johnston, and George Mansfield, J. F. McMurray and Melvin Cornish have, within the last five years, unlawfully and fraudulently converted large sums of money belonging to the Choctaws and Chickasaws to their individual use; that during the period of time from November 2, 1902, to July 28, 1904, D. H. Johnston, P. S. Moseley, George Mansfield, J. F. McMurray

and Melvin Cornish, and others to complainant unknown, unlawfully and fraudulently appropriated out of the common funds of the Choctaws and Chickasaws, the sum of $28,876.90, to their individual use, to which sums of money they had no lawful right, and in which sums of money complainants had a vested interest, to the great, lasting and irreparable injury of complainants.

XXIV.

That the Secretary of the Interior who is now directing the administration of this estate, has been informed of the alleged
27 bribery by said firm of attorneys of certain members of said Choctaw-Chickasaw Citizenship Court and of the fraud that was perpetrated by said attorneys in procuring the payment of said fee of $750,000 and that the said Secretary has never investigated or even caused to be investigated the allegations of said bribery, and the fraudulent payment out of said trust funds of the said $750,000 to said attorneys for said pretended services, and has failed and refused to bring any suit or other proceeding for the recovery of said $750,000 so wrongfully and wickedly disbursed, and in which complainants have a vested right; that in the month of May, 1905, D. H. Johnston, P. S. Moseley, George Mansfield, J. F. McMurray and Melvin Cornish were indicted by a federal grand jury, sitting at Ardmore, Chickasaw Nation, for the crime of "conspiracy to defraud" the Chickasaws out of the said sum of $28,876.90, and although documentary evidence then in the possession of the District Attorney indicated clearly the guilt of said persons the indictments were ordered dismissed upon the recommendation of the Secretary of the Interior and no action has ever been instituted by the said Secretary or any officer of the Government to recover said sum so unlawfully secured by said persons, to the great, lasting and irreparable injury of complainants.

XXV.

That the Secretary of the Interior has, without authority of law, withdrawn from allotment or from the use of the lawful owners thereof, 1,386,720 acres of the lands which were a part of said grant, and has included said lands so wrongfully withdrawn in a game preserve or forest reserve, and that the said Secretary will, unless restrained by order of this court, from so doing, establish a permanent game preserve or forest reserve out of the lands so wrongfully withdrawn, and thereby prevent the lawful owners thereof from deriving any benefit from said lands, to the great, lasting and irreparable injury of complainants.

28 XXVI.

That the Secretary of the Interior has, without authority of law, reserved from the common lands of the Choctaws and Chickasaws a large tract of land situated at or near the town of Sulphur, Chickasaw Nation, as a national reserve, and on which valuable mineral springs are located, said action being taken under pretended au-

thority of law in the form of a pretended agreement with the Choctaws and Chickasaws, which agreement was negotiated by representatives appointed by the tribal authorities and ratified by a majority of the adult male "citizens" of the Choctaw and Chickasaw Nations; that many of the said "citizens" by whose votes said pretended agreement was ratified were not of the said designated class of beneficiaries for whose exclusive use and benefit the grant was made, and had no lawful interest in the property thus reserved, and therefore had no lawful right to enter into an agreement with the Government of the United States for its sale or other disposition; that by the terms and provisions of said pretended agreement the Choctaw and Chickasaw Nations have attempted to convey to the United States the legal title to the said land for a consideration of $20 per acre, an amount far less than the actual value of said lands, without the consent of complainants; that the said Secretary deposited the money thus paid by the Government of the United States in the subtreasury of the United States to the credit of the Choctaws and Chickasaws for the exclusive use and benefit of those persons whose names appear on the approved "citizenship" rolls of said Nations, to the great, lasting and irreparable injury of complainants.

XXVII.

That the Secretary of the Interior has, without any consideration therefor, and without authority of law, conveyed the following among other lands which were a part of, or which resulted from said grant, to the following among other persons and institutions:

29 160 acres to Jones' Academy, 160 acres to Tuskahoma Female Seminary; 160 acres to Wheelock Orphan Academy; 160 acres to Bloomfield Academy; 160 acres to Lebanon Orphan Home; 160 acres to Harley Institute; 160 acres to Rock Academy; 160 acres to Collins Institute; 80 acres to J. S. Murrow; 80 acres to H. R. Schermerhorn; 80 acres to widow of R. S. Bell; and has also, without authority of law, given away and donated large areas of said lands to various and sundry other persons and institutions, to complainants unknown, without authority of law, and without the consent of complainants, and in which property complainants had and have a vested right, to the great, lasting and irreparable injury of complainants.

XXVIII.

That the said Secretary of the Interior has set aside and reserved from allotment from the said lands, which were a part of said grant, 437,734 acres underlain with valuable coal deposits, and has leased said lands to various and sundry individuals, companies and corporations, and has for many years past, and is now, annually receiving large revenues from said persons, companies and corporations holding said leases, and has deposited said funds in the sub-treasury of the United States to the credit of those persons whose names appear on said "citizenship" rolls as approved by him on or before March 4, 1907, and has from time to time, and is now, without authority of law, disbursing said funds for the benefit of persons others

than those who have a lawful right to share in said funds, and has illegally refused and now refuses to permit complainants to share therein notwithstanding complainants have a vested right and interest in said coal lands thus reserved, and the revenue derived therefrom, to the great, lasting and irreparable injury of complainants.

XXIX.

30 That the said Secretary of the Interior has reserved from allotment a large area of said lands, which were a part of said grant, underlain with valuable asphalt and other mineral deposits, and has entered into leases with various persons, companies and corporations, for the mining of said asphalt and other minerals, and has received, and is now receiving annually, large sums of money derived therefrom, which money has been placed in the Treasury of the United States to the credit of those persons whose names appear upon the rolls of "citizen-ship" of the Choctaw and Chickasaw Nations, as approved by him on or before March 4, 1907; that said sums of money so deposited are being disbursed by the said Secretary for the exclusive use and benefit of those persons so enrolled as "citizens" to the exclusion of complainants who have a vested right and interest therein, to the great, lasting and irreparable injury of complainants.

XXX.

That the Principal Chief of the Choctaw Nation, Green McCurtain, and the Governor of the Chickasaw Nation, D. H. Johnston, have entered into a pretended contract with either the law firm of Mansfield, McMurray & Cornish, located at McAlester, Choctaw Nation, Oklahoma, or with the individual members thereof, or with certain members of said firm and certain other persons, by the terms and provisions of which pretended contract the said attorneys or other persons are authorized to sell and dispose of the segregated coal lands for the sum of ten million dollars, a sum far less than the actual value of said lands, and that the said Mansfield, McMurray & Cornish, or certain members thereof, are now attempting to negotiate a sale of said lands for a consideration of ten million dollars to the State of Oklahoma, or to such other person or persons as can be found who will pay the said sum of ten million dollars therefor; and that said persons will, unless restrained by order of this court, sell and convey said valuable segregated coal lands
31 to the State of Oklahoma, or to such other person or persons, or corporation, as may be found who will purchase the same; and will deposit the said sum of ten million dollars derived therefrom, less a commission of ten per cent., which is to be paid to said attorneys, or other persons associated with them, for the sale of said lands, in the sub-treasury of the United States to the exclusive credit of those persons who have been enrolled as "citizens" of said Nations, and in which valuable segregated coal lands complainants have a vested interest, to the great, lasting and irreparable injury of complainants.

Wherefore complainants pray:

a. That copy subpœna and all proper process issue making Green McCurtain, in his private capacity as a citizen of the Choctaw Nation party defendant, and requiring him to appear and answer fully the exigencies of this bill.

b. That copy subpœna and all proper process issue making Douglas H. Johnston, in his private capacity as a citizen of the Chickasaw Nation party defendant, and requiring him to appear and answer fully the exigencies of this bill.

c. That copy, subpœna and all proper process issue making George Mansfield, J. F. McMurray and Melvin Cornish, co-partners in law and doing business under the firm name and style of Mansfield, McMurray and Cornish, resident of the town of McAlester, Choctaw Nation, Oklahoma, parties defendant and requiring them jointly and individually to appear and answer fully the exigencies of this bill.

d. That after the filing of this bill and service thereof on the defendants, Green McCurtain and Douglas H. Johnston, in their private capacity as citizens of the Choctaw and Chickasaw Nations, respectively, that copy subpœna and all proper process issue making Green McCurtain and Douglas H. Johnston in their official capacity as Principal Chief of the Choctaw Nation, and Governor of the Chickasaw Nation, respectively, parties defendant, and that
32 they be summoned into this court in their official capacity as such, Principal Chief and Governor, respectively, and required to answer fully the exigencies of this bill; and that such service shall operate as service on all persons whose names appear on the rolls of "citizenship" and the rolls of "freedmen" of the Choctaw and Chickasaw Nations as approved by the Secretary of the Interior on or before the fourth day of March, 1907.

e. That copy subpœna and all proper process issue making James R. Garfield, in his official capacity as Secretary of the Interior of the United States, party defendant and requiring him to appear and answer fully the exigencies of this bill, and that service be made on Thomas Ryan, Assistant Secretary of the Interior with offices at Muskogee, Oklahoma.

f. That a preliminary writ of injunction issue directed to the said James R. Garfield, enjoining and restraining him in his official capacity as Secretary of the Interior of the United States, and each and every one of his official representatives or agents, from making or permitting to be made, any further allotments out of the common lands which were a part of or which resulted from said grant made to the Choctaw Nation by letters patent executed on February 23, 1842, to persons whose names appear on said rolls of "citizens" and "freedmen" of the Choctaw and Chickasaw Nations as approved by him on or before March 4th, 1907, from approving or delivering to any allottee any patent or other paper passing or purporting to pass title to any such land allotted to any person whomsoever; from selling or in any way disposing of or encumbering by lease or otherwise, any part of said property; from paying out or disbursing any funds in the Treasury of the United States, or in any sub-treasury thereof,

or in the possession of or under the control of any officer, agent, or employe of his department derived from the sale of any such property; from interfering with the rights of any complainants
33 in the enjoyment of any lands of which complainants, or any of them, are now in possession; from permitting any persons enrolled as "freedmen" from acquiring by purchase or otherwise, sufficient of said property to make up an individual allotment of 40 acres of land, or from acquiring by purchase or otherwise any of said property whatsoever; from attempting by approval or otherwise to make any fees contracted to be paid attorneys a lien upon any of said property, either lands or moneys, pending a final determination of this cause, and that upon a final hearing said injunction be made perpetual.

g. That James R. Garfield, Secretary of the Department of the Interior, be required to render an accounting of all lands which were a part of said grant sold, granted or given away by the Government of the United States, or any officer thereof since said grant was made, and of all funds received therefrom and of all disbursements made therefrom.

h. That the said Green McCurtain and Douglas H. Johnson Principal Chief and Governor of the Choctaw and Chickasaw Nations, respectively, be restrained and enjoined, jointly and severally, pending a final determination of this cause from issuing either in their official or individual capacity any instrument in writing passing or purporting to pass the legal or equitable title to any lands allotted to any person enrolled by said Secretary as either a "citizen" or "freedman" of said Nations; that they be enjoined and restrained jointly and severally, from making or approving either in their official or individual capacity, any contract for the sale or disposition of any part of the property which was a part of the grant made to the Choctaw Nation on the 23rd day of March, 1842, or which has resulted therefrom; and that they be restrained and enjoined jointly and severally, either in their official or individual capacity,
34 from consum-ating or attempting to consum-ate any sale of said property, and that each of them be required to render an accounting of all funds received by them which belonged to the Choctaws or Chickasaws, and of all disbursements made thereof.

i. That George Mansfield, J. F. McMurray and Melvin Cornish be jointly and severally restrained and enjoined, pending a final determination of this cause, from negotiating the sale of any property which was a part of said grant made on the 23rd day of March, 1842, or which has resulted therefrom, and that upon a final hearing of this cause said temporary injunction be made perpetual; that each of said persons be required to render an accounting of all moneys received by him or by said firm of Mansfield, McMurray & Cornish, at any time belonging to the Choctaws and Chickasaws.

j. That pending a final determination of this cause an order issue restraining and enjoining each and every person whose name appears on either the "citizen" or "freedmen" rolls of said Nations as approved by the Secretary of the Interior on or before March 4, 1907, from selling, encumbering, or in any way disposing of any of said

lands allotted to any such person, or any interest therein, and that service of this order thus enjoining and restraining each and every one of such persons be made by publication thereof in at least three consecutive issues of the three leading daily or weekly papers published and circulated in the Choctaw and Chickasaw Nations.

k. That upon a final hearing of this cause the right title and interest of complainants, as well as every person who can show to this court that he or she is of the designated class of persons for whose exclusive use and benefit said grant was made, in and to all the property which was a part of the special grant made to the Choctaw Nation by letters patent from the President of the United States, issued under date of March 23, 1842, or which has resulted therefrom, be by appropriate decree*d* declared, and that the Secretary of
35 the Interior be required to respect said decree in the distribution of all said property remaining under his control.

l. That upon a final hearing of this cause all allotment certificates, patents and other instruments in writing executed by the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, and approved by the Secretary of the Interior, conveying or purporting to convey title to any of said property, which was a part of said grant made to the Choctaw Nation on March 23, 1842, or which has resulted therefrom, to any "citizen," "freedman," or other person whomsoever, who is not one of said designated class of persons, be by appropriate decree declared null and void; or as an alternative, that every person not of the designated class of persons for whose exclusive use and benefit said grant was made and to whom an allotment of land has been made, and who has received a certificate therefor, and for which allotment of land a patent or other instrument in writing has been approved, as aforesaid, passing or purporting to pass the title thereto as aforesaid, be by appropriate decree declared a trustee of said property for the lawful owners thereof, and required to make proper conveyance thereof of such title as such person has acquired to such trustee as this court may designate to receive and hold every such title so unlawfully conveyed.

m. That upon a final hearing of this cause the pretended conveyance or conveyances to the Government of the United States of the property included in the "Sulphur National Reserve" be by appropriate decree set aside and rendered null and void; that said reserve, together with the mineral thereon be, by appropriate decree directed to be sold at public auction to the highest bidder, or in such other way as to this court may seem just and proper; that the proceeds derived from said sale be distributed among the lawful owners of said property as found by this court, share and share alike.

n. That upon a final hearing of this cause said Secretary
36 be required to revoke and set aside any order heretofore approved by him withdrawing from allotment or distribution any lands which were a part of said grant, or which have resulted therefrom, and which are now reserved under any such order for inclusion in a game preserve or forest reserve; and that he be permanently restrained and enjoined from interfering with the selection and use of any part of said lands so withdrawn by any person

found by this court to be entitled to share in the property in controversy, which is not in excess of such person's lawful share thereof.

o. That upon a final hearing of this cause the reservation from allotment made by the Secretary of the Interior of all coal, asphalt, and other mineral lands be, by appropriate decree, declared valid, and that said lands be decreed to be sold at public auction to the highest bidder, or in such other way as to this court may seem just and proper; that the proceeds derived therefrom be distributed among the lawful owners thereof as found by this court, share and share alike.

p. That upon final hearing of this case, George Mansfield, J. F. McMurray and Melvin Cornish be required to pay into this court the sum of $750,000, with interest thereon at the rate of five per cent. from the day said money was paid to them, and such other sums as they have unlawfully received belonging to said designated class of people; that said sums thus paid in be distributed among the lawful owners thereof as found by this court, share and share alike.

q. That each and every donation of any part of said property by the Secretary of the Interior to any person, copartnership, or corporation be, by appropriate decree, declared null and void; or as an alternative, that each such person, co-partnership or corporation be declared a trustee of said property so conveyed, and be required to convey such title as such person, co-partnership or corporation may hold to a trustee designated by this court to be sold by said
37 trustee so designated at public auction to the highest bidder and the funds derived therefrom distributed among those persons found by this court to be the lawful owners thereof, share and share alike.

r. That upon a final hearing of this cause said Secretary of the Interior be required, by order of this court, to distribute or cause to be distributed, all of the property which is under his control and which was a part of, or which has resulted from said grant, among the persons found by this court to be entitled to share therein, upon the basis fixed in said pretended agreements approved June 28, 1898, and July 2, 1902, or upon such other basis as to this court may seem just and proper.

s. That after all of said property has been sold that all funds in the possession of this court be distributed among the lawful owners thereof, as found by this court, share and share alike.

t. Complainants also pray for such other and further relief as to this court may seem just and proper.

(Signed) J. E. FLEMING,
Principal Complainant.

BALLINGER & LEE,
Solicitors for Complainants.

38 STATE OF OKLAHOMA,
County of Carter, ss:

Personally appeared before me M. S. Wolverton a Notary Public in and for the District aforesaid, J. E. Fleming, to me well known, who upon his oath deposes and says: that he has read the within

and foregoing complaint by him subscribed and knows the contents thereof; that the matters and things therein stated of his own knowledge, are true, and that those stated upon information and belief, he verily believes to be true.

(Signed) J. E. FLEMING.

Subscribed and sworn to before me this 23 day of June 1908.

[SEAL.] (Sgd.) M. S. WOLVERTON,
Notary Public.

My commission expires May 4, 1912.

Notice to Respondents.

Complainant for himself and for and on behalf of all persons for whose benefit this suit is brought, hereby expressly waives answer of defendants under oath.

(Signed) J. E. FLEMING.

39 *Chancery Subpœna.*

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

The United States of America to Green McCurtain, Douglas H. Johnston, George Mansfield, J. F. McMurray, co-partners doing business under the firm name of Mansfield, McMurray & Cornish and James R. Garfield, Secretary Dept. Interior, Greeting:

We command you and every one of you, that you appear before our Judge of our Circuit Court of the United States of America for the Eastern District of Oklahoma, at the City of Muskogee, in said District, on the first Monday in the month of August, next, to answer the Bill of Complaint of J. E. Fleming *et al.*, this day filed in the Clerk's office of said Court in said City of Muskogee, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Eastern District of Oklahoma to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Muskogee, in said District, this 24th day of June A. D. 1908.

[SEAL.] L. G. DISNEY, *Clerk.*
By FLORENCE HAMMERSLY,
Deputy Clerk.

MEMORANDUM.—The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court, at the City of Muskogee aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

[SEAL.] L. G. DISNEY, *Clerk.*
By FLORENCE HAMMERSLY,
Deputy Clerk.

39a [Endorsed:] Original No. 271. Circuit Court United States, Eastern District of Oklahoma. J. E. Fleming *et al.*, *vs.* Green McCurtain *et al.* Chancery Subpœna. Returnable to rule day, first Monday in August A. D. 1908. L. G. Disney Clerk. By Florence Hammersly Deputy Clerk. Filed Jul 28, 1908, A. D. L. G. Disney, Clerk. U. S. Ct. Ct. Eastern Dist. Oklahoma.

U. S. Marshal's Return.

EASTERN DISTRICT OF OKLAHOMA, *ss:*

Received the within writ July 11th the 190-, and executed the same as follows, to-wit: Served on the within named Sec. of Dept. of Interior by leaving a true copy of this writ with attached complaint with Thos. Ryan, assistant Sec. of Int. at Muskogee, Ok. on July 13, 1908.

S. G. VICTOR, *U. S. Marshal.*
By J. W. HUBBARD, *Deputy.*

Received this writ July 15, 1908 at Muskogee; served the same on the within named Green McCurtain by leaving a true copy with him personally at Kinta, July 20, 1908.

S. G. VICTOR, *U. S. Marshal,*
By H. G. MATOON, *Deputy.*

Received this writ at — on July 13, 1908 and served the same by delivering a true copy with attached complaint, to Douglass H. Johnson at his home in Emett Okla., on July 17, 1908.

S. G. VICTOR, *U. S. Marsha-,*
JNO. S. HAMMER, *Deputy.*

Received this writ at Muskogee Okla. July 13, 1908, and served the same on George Mansfield & J. F. McMurray, co-partners, doing business under firm name of Mansfield, McMurray & Cornish by leaving a true copy with J. F. McMurray personally at Muskogee, July 14, 1908 at 8:30 o'clock P. M.

S. G. VICTOR, *U. S. Marshal,*
By H. G. MATOON, *Deputy.*

39*b* In the United States Circuit Court, Eighth Circuit, Eastern District of Oklahoma.

J. E. FLEMING, Complainant,
vs.
GREEN MCCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD, J. F. MCMURRAY, MELVIN CORNISH, Co-partners, Doing Business under the Firm Name and Style of Mansfield, McMurray & Cornish; and JAMES R. GARFIELD, Secretary of the Department of the Interior of the United States, Defendants.

Demurrer.

Now come the defendants in the above entitled cause and demur to the bill in equity filed herein against them for the following reasons:

First. Because there is no equity in the bill and because it does not state facts sufficient to entitle complainant to the relief prayed for, or to any relief whatever;

Second. Because the matters named in the bill are matters of administration which cannot be taken away from the executive department of the government and reviewed by the courts;

Third. Because it appears from the bill that all of the acts complained of by the complainant were done and committed by the executive department of the government and its agencies acting under the laws of Congress, all of which laws have been upheld and sustained by the Supreme Court of the United States;

Fourth. Because this Court has no jurisdiction over the subject matter of this suit.

E. P. HILL,
STUART & GORDON,
Att'ys for Mansfield, McMurray & Cornish, Green McCurtain, and Douglas Johnston.

39*c* STATE OF OKLAHOMA,
County of ——, *ss:*

In the United States Circuit Court, Eighth Circuit, Eastern District of Oklahoma.

George Mansfield makes oath and says that he is one of the defendants in the above entitled cause, and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

GEORGE A. MANSFIELD.

Subscribed and sworn before me this 20th day of July, 1908.

[SEAL.] L. G. DISNEY,
Clerk U. S. Circuit Court.

Certificate of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

C. B. STUART,
Att'y for Def'ts.

[Endorsed:] No. 271. In the United States Circuit Court, Eighth Circuit, Eastern District of Oklahoma. J. E. Fleming, Complainant, *vs.* Green McCurtain, *et al.*, Defendants. Demurrer. Filed July 20, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern District Oklahoma.

39½ UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, Loren G. Disney, Clerk of the Circuit Court of the United States of America, for the Eastern District of Oklahoma, do hereby certify the foregoing to be a true, full and correct copy of demurrer interposed by the defendants therein named *in re* J. E. Fleming, complainant, *vs.* Green McCurtain, *et al.*, defendants, #271, which said demurrer was filed in this court on the 20th day of July, 1908.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Muskogee, in said District, this 11th day of September A. D. 1908.

[Seal of the United States Circuit Court, Eastern District of Oklahoma.]

L. G. DISNEY, *Clerk*,
By A. S. FARNHAM,
Deputy Clerk.

40 In the United States Circuit Court, Eighth Circuit, Eastern District of Oklahoma.

JAMES E. FLEMING ET AL., Complainant-,
vs.
GREEN MCCURTAIN, DOUGLAS H. JOHNSON, GEORGE MANSFIELD, J. F. MCMURRAY, MELVIN CORNISH, Co-partners, Doing Business under the Firm Name and Style of Mansfield, McMurray and Cornish, and JAMES R. GARFIELD, Secretary of the Department of the Interior, Defendants.

Special Appearance of Secretary of the Interior.

Comes now, this 20th day of July, 1908, James R. Garfield, the Secretary of the Interior, in his official capacity, by the undersigned, his solicitor, and although not served with any subpœna or other process, appearing specially for the purpose, says:

This Court has no jurisdiction of the subject matter set forth in

the bill of complaint herein filed, nor any jurisdiction of the party really sued as defendant, viz: the United States.

In the event the Court shall be of a contrary opinion and only in that event he desires to be considered as appearing to show cause why preliminary writ of injunction should not issue, and says;

Even assuming the truth of the allegations in the complaint well pleaded, which he does not admit, they would make out no case of imminent irreparable injury requiring the issuance of the writ; that great and needless damage would be done by issuing it; and that it would not be seemly for this Court while awaiting the mandate of the Court of Appeals in the case of Bettie Ligon, *et al., vs.*

41 Douglas H. Johnston, *et al.*, to take a course the necessity for which has not impressed itself upon the Court of Appeals or the Court of the Indian Territory to which this Court is with regard to these cases, the successor.

WM. J. GREGG,
United States Attorney, Solicitor,
By HARLOW A. LEEKLEY,
Assistant U. S. Attorney.

CHARLES W. RUSSELL,
Assistant Attorney-General, of Counsel.

[Endorsed:] Filed Jul. 20, 1908, L. G. Disney, Clerk U. S. Court, Eastern District Oklahoma.

42 In the United States Circuit Court for the Eastern District of Oklahoma.

No. 271. Equity.

J. E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Defendants.

Opinion of Court.

CAMPBELL, *District Judge:*

The complainant, J. E. Fleming, for himself and on behalf of several thousand others whom he alleges to be similarly situated, files his bill against the respondents, Green McCurtain, Douglas M. Johnston, and all persons appearing with them upon the citizenship rolls of the Choctaw and Chickasaw Nations, and all persons whose names appear upon the freedmen rolls of said Nations, and against the respondents Mansfield, McMurray & Cornish, as partners, constituting the firm of that name, and against James R. Garfield, Secretary of the Interior.

It is sought by the bill, to enjoin the Secretary of the Interior from making further allotments of the lands of the Choctaw and Chickasaw Nations to persons whose names appear upon the citizenship or freedmen rolls of said nations, as approved by said Secretary

of March 4th, 1907, and to enjoin him from approving or delivering patents for any such lands to any allottees, and from
43 selling or otherwise disposing of or encumbering any portions of such lands, and from paying out or disbursing any of the funds of said nations, and from interfering with any of the complainants now in possession of any of said lands, and from permitting freedmen to acquire, by purchase or otherwise, sufficient of said lands to make up an individual allotment of forty acres of said land, and from attempting, by approval or otherwise, to make any fees contracted to be paid attorneys a lien upon any of said property.

To require said Secretary of the Interior to render an accounting of all lands of said nations granted or given away by the Government of the United States, or any officer thereof, and all funds received therefrom, and all disbursements made therefrom, since the date of the grant of the said lands to said nations in 1842.

To enjoin said McCurtain and Johnson from issuing any patents to any allottees, citizens or freedmen, and from making or approving any contract for the sale or disposition of the property which was part of the grant made to the Choctaw Nation on March 3rd, 1842, or which has resulted therefrom, and from consummating or attempting to consummate a sale of said property, and that they render an accounting of all funds received by them that belonged to the Choctaw or Chickasaw Nations, and of all disbursements made thereof.

That said Mansfield, McMurray & Cornish be enjoined from negotiating the sale of any of said property which was part of the said grant made on the 23rd day of March, 1842, or which has resulted therefrom, and that they be required to render an accounting of all money received by them, individually or as a firm, at any time, belonging to the Choctaw and Chickasaw Nations.

To enjoin the allottees of the lands of said nations, either citizens or freedmen, from selling, encumbering, or in any
44 way disposing of the lands allotted to them.

That this court by appropriate decree declare the right of complainants and others similarly situated in and to the property covered by said grant of 1842, and that the Secretary of the Interior be required to respect said decree in the distribution of all said property remaining under his control.

That all patents issued to allottees not descendants of persons who were members of the Choctaw or Chickasaw Nations in 1842, when said grant was made, be declared null and void; or that they be declared trustees of the lands covered by said patents for the use and benefit of the special class to which complainants profess to belong, and that they be required to make proper conveyance thereof to such trustee as this court may designate to receive and hold the same.

That the conveyance of the Sulphur National Reserve to the United States be set aside, the said land sold at public auction, and the proceeds divided amongst the rightful owners thereof.

That the order of the Secretary of the Interior, reserving certain timber lands from allotment, be set aside.

That the segregated coal and asphalt lands in said nations be sold at public auction to the highest bidder, or in such other way as the

court may see proper, and the proceeds divided amongst the rightful owners of said land.

That Mansfield, McMurray & Cornish be required to pay into court certain moneys alleged to have been unlawfully received by them, and that the same be distributed to the lawful owners.

That all donations of any part of said property, heretofore made by the Secretary of the Interior, be declared null and void.

That the Secretary of the Interior be required to distribute, or cause to be distributed, all the property which is under
45 his control and which was part of, or has resulted from, said grant of 1842, and all funds in the possession of said Secretary, among the persons found by this court to be entitled to share therein, upon such basis as to this court may seem proper.

It will be noted from an examination of the bill and the foregoing résumé of the prayer thereof that its purpose, briefly stated, is to set aside all that has been done by the legislative and executive departments of the Government up to the present time toward distributing the lands and moneys of these Indian tribes to the individual members thereof in severalty, and to declare all lands covered by the said patent of 1842, and the funds arising therefrom, to be held in trust by said nations for the use and benefit of the individuals of a certain class, composed of those who were members of the Choctaw and Chickasaw tribes at the time said grant was made and their descendants, and that thereafter this court shall determine the basis and manner of distribution of said lands and moneys among said individuals.

As grounds for the sweeping relief sought by the prayer of the bill, complainant alleges that in the treaty with the Choctaws entered into on September 27th, 1830 and proclaimed as a law on February 21, 1831, it was stipulated and agreed that upon the ratification of said treaty, the United States by a grant specially to be made by the President should cause to be conveyed in fee simple to the Choctaw Nation the tract of country west of the Mississippi river which included what comprised the lands of the Choctaw and Chickasaw nations in the Indian Territory at the time the present scheme of allotment was inaugurated, said lands to be held by said Choctaw nation in trust for the exclusive use and benefit of a designated class of persons consisting of all those persons who were members of
46 the Choctaw community of Indians at the time of the treaty of Dancing Rabbit Creek in 1830 and their descendants; that it was further provided by said article of said treaty that the fee to said property to be specially conveyed by the President to the Choctaw Nation in trust should continue to be held by said nation in trust and continue to enure to the benefit of all said persons so long as said designated class of persons should maintain a national tribal existence and live on the land, after which the fee should no longer be held in trust and enure, but should pass to and vest in the then living beneficiaries under the trust. The bill then refers to the treaty of 1837, by which the Chickasaws acquired the rights they now possess within the limits of the grant provided for by said treaty. The bill then recites the patent of March 23, 1842, by the President, to the Choctaw Nation, made pursuant to said treaty, by

which complainant contends the lands therein described were conveyed to the Choctaw Nation in fee simple, title to be held by said nation in trust for the exclusive use and benefit of the said designated class of persons above referred to; that complainant, and those in whose behalf this suit is brought, are members of said designated class; that complainants, as members of said class of persons, have at all times since their birth, been vested with an indefeasible title to an undivided interest in all the property, both lands and moneys, which was a part of or which resulted from said grant. The bill then refers to the various acts of Congress under which, within the last fifteen years, the lands of the said nation have been and are being allotted in severalty to the individual members thereof. It is alleged that the agreements entered into between the Dawes Commission and the Choctaw and Chickasaw Nations are invalid and null and void, because not ratified by a majority of the members of the designated class above referred to, and that the subsequent acts of Congress, pursuant to said agreements are therefore unconstitutional and void; that said acts of Congress are null and void in so far as they provide for allotment of lands to freedmen and intermarried citizens, for the reason that they are not descendants of any of the members of said tribes in existence at the time said grant was made. Charges of fraud, bribery, and mistake of law and fact are made as against the Dawes Commission and the Citizenship Court, in the discharge of their respective duties as the agents of Congress in the determination of membership in said tribes.

47

The defendants were cited to appear on July 20th, 1908, and show cause why a temporary injunction should not issue as prayed for, at which time the defendants McCurtain and Douglas, and Mansfield, McMurray & Cornish appeared, by their solicitors, and demurred to the bill on the following grounds:

"First. Because there is no equity in the bill and because it does not state facts sufficient to entitle complainant to relief prayed for, or to any relief whatever;

Second. Because the matters named in the bill are matters of administration which cannot be taken away from the executive department of the Government and reviewed by the courts;

Third. Because it appears from the bill that all of the acts complained of by the complainant were done and committed by the executive department of the Government and its agencies acting under the laws of Congress, all of which laws have been upheld and sustained by the Supreme Court of the United States;

Fourth. Because this court has no jurisdiction over the subject matter of this suit."

At the same time the Secretary of the Interior appeared specially by his solicitors and filed his special appearance, a portion of which is in the nature of a demurrer to the jurisdiction of this court of the subject matter set forth in the bill. By agreement of counsel the matters raised by respondents, in the nature of demurrers to the bill, were taken up and argued, and the application for temporary injunction was postponed pending a determination of the points raised by the demurrers.

48 The first question to be considered is whether by the patent of 1842 the lands conveyed passed to the Choctaw and Chickasaw Nations in trust for the individual members of said tribes then living and their descendants, as a designated class, so as to vest in each individual of said class a present vested right or interest in the said property; or whether, on the other hand, it was a grant to said tribes for the common use and benefit of the members thereof while they should exist as nations and continue to live upon it, the membership not necessarily to be confined to those then in existence and their descendants, but to be determined from time to time by the laws and customs of the respective tribes.

At the time of the treaty of 1830 and at the time the grant under consideration was made, the Choctaw and Chickasaw Indians, as well as all other tribes or nations of Indians, held the lands then occupied by them as common tribal property and not in severalty. The United States in dealing with the Indians had always dealt with them in their tribal or national capacity. As said by Chief Justice Marshall in Worcester *v.* Georgia, Sixth Peters, 554:

"The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants and for their protection from lawless and injurious incursions into their country. That power was naturally termed their protector. They had been arraigned under the protection of Great Britain, but the extinguishment of the British power in their neighborhood and the establishment of that of the United States in its place, led naturally to the declaration on the part of the Cherokees that they were under the protection of the United States and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain. This relation was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character and submitting as subjects to the laws of a master."

And as suggested a little later in the opinion, the object sought by the United States was the preservation of the Indian Nations.

In the treaty of 1820 with the Choctaw Nation (Kappler's Laws and Treaties, 2nd Ed., Vol. 2, page 191), by which the lands
49 now in controversy were first ceded to the Choctaws, the preamble states that it is a main object with the President of the United States to promote the civilization of the Choctaw Indians by the establishment of schools amongst them, and to perpetuate them as a nation by exchanging for a small part of their lands in Mississippi, a country beyond the Mississippi River where all who live by hunting and will not work may collect and settle together. That these Indians would eventually take up the ways of the white man and become owners of the tribal lands in severalty appears at that time to have been deemed a condition too remote for consideration at that time. The very fact that the legislatures of the states in which they then lived were seeking to extend over them the laws of the white man gave rise to this and similar treaties and grants. And in construing this grant, as said by the United States Supreme Court in New York Indians *vs.* United States, 170 U. S., 1, "the language of the granting clause is not conclusive, but the intent of Congress

must be gathered from the whole scope of the instrument and the facts to which it was intended to apply." The language of the granting portion of the patent is as follows:

"Now, Know Ye, That the United States of America in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation, the aforesaid 'Tract of country west of the Mississippi,' to have and to hold the same, with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, as intended, 'To be conveyed' by the aforesaid article, 'In fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it,' liable to no transfer or alienation except to the United States or with their consent."

Complainants contend that the grant was to the Choctaw Nation as trustee for the exclusive use and benefit of those persons comprising the Choctaw community on the date that the treaty was
50 ratified and was to enure to them and their descendants, vesting in the Choctaw Nation as trustee the legal title in fee simple, and in the individuals of the nation and their descendants the present equitable title, and that for the purposes of defining the life of the trust were added the words "to enure to them while they shall exist as a nation and live on it." If this contention be correct, then however long the nation might continue as such, and however many additions to its membership might result from its adoption of persons not of the designated class, such new members would not acquire any interest in the tribal property. In construing the terms of the treaty and the grant, we were not confined to the strict common law meaning of the various words and phrases; but, as said by the court in Choctaw Nation *v.* United States, 119 U. S. R. 28, "how the words were understood by this unlettered people, rather than their critical meaning should form the rule of construction. * * * The rules to be applied to the present case are those which govern public treaties, which even in the case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations." In Jones *v.* Meehan, 175 U. S. 1-11, it was said that a treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. In the recent case of Goodrum, *et al., v.* Buffalo, decided by the United States Circuit Court of Appeals for the Eight Circuit, at the May, 1908, term, it was contended by counsel for appellant that the provisions of the act of Congress imposing restrictions on Quapaw Indian lands were under the rules of the common law inconsistent with the estate in fee granted by the patents. Judge Phillips, speaking for the court, says:

51 "Counsel for plaintiffs in error undertake to meet the force of these authorities with the contention that the limitation upon alienation is inconsistent with the estate in fee conveyed by the grant, and that on principles of the common law, it should be lim-

ited in its operation to the life of the immediate patentee; and therefore upon his death, his heirs had the right of disposal without restraint. We make no contention that at common law it was against the policy of the law to allow restraints to be imposed upon the alienation of an estate in fee. In our judgment, this and kindred rules of the common law, respecting the title and alienability of lands have no applicability to this case."

It will hardly be denied that the conduct of the internal tribal affairs of these nations or tribes was exclusively a matter to be determined by the tribes themselves. The right inhered in them, as a necessary incident of their tribal or national autonomy, to determine in their own way who should comprise the members of the tribe and what additional persons, if any, from time to time, should be admitted to membership therein. (Roff *vs.* Burney 168 U. S. 218—Wallace *vs.* Adams, 143 Fed. 723.) It is a matter of history that these and others of the five civilized tribes, from the very beginning of their residence in Indian Territory, admitted many persons to membership in the tribe by adoption, intermarriage, etc., so that the tribal membership eventually extended far beyond the individuals comprising the tribe in 1842 and their descendants, these additional members acquiring at least political if not property rights therein.

In 1855, after twenty years or more of residence in the Indian Territory, the Choctaws and Chickasaws entered into another treaty with the United States (Kappler's Laws and Treaties, 2d Ed., Vol. 2, 706), in the preamble of which it was stated, as one of the purposes, that "it is necessary for the smplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied in one comprehensive instrument. In Article I of this treaty is the following provision:

52 "And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, However, No part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

Here is a treaty not purporting to change any existing treaty stipulations, but the purpose of which is to embody them in one comprehensive instrument. It then proceeds to guarantee the lands of the tribes not to be original members of 1842 and their descendants, but to the then present membership, their descendants, and successors, so that each member of the tribe shall share in its lands.

In 1866, eleven years later, still another treaty was entered into, in which is incorporated a plan for a division of the lands in severalty. In Article XI of this Treaty, it is recited that "the land occupied by the Choctaw and Chickasaw Nations and described in the treaty between the United States and said Nations of June 22nd, 1855, is now held by the members of said nations in common, under the provisions of said treaty."

From this treaty down to the creation of the Dawes Commission, we find these Indians making membership in the tribes the test as to the interest in the tribal lands and property. Whatever might be the conclusion reached from a consideration solely of the terms of the treaty of 1830 and the grant of 1842 pursuant thereto, tested by the rules of the common law and those technical rules laid down by the courts to control similar transactions between individuals, it is the opinion of the court that it was the understanding of these Indians at the time the treaty and patent were made, and has been ever since, that the grant of land was made to the nation for the common use and benefit of it members, whoever they might be
53 from time to time, so long as national existence should continue, and they should continue to occupy it and that when, by the logic of events, it finally became expedient and necessary to change this communal ownership into individual ownership, membership in the tribe at that time became the test as to the right in the individual to share in the lands and property of the tribe, with the additional right extended to freedmen to participate therein in accordance with agreements entered into with the tribes and ratified by Congress. As said by Judge Sanbourn in Wallace *v.* Adams, 143 Fed. 717, "These nations were owners of a large and valuable tract of land in common so that each and every member of each tribe had an equal undivided interest in the whole."

The legislative and executive branch of the government, in dealing with these Indian lands and allotting them to individual Indians, have so construed the grants under which those lands are held, and have accordingly made membership in the tribe the test as to the right of the individual to receive an allotment. If we are correct in assuming that such was the understanding of the Indians themselves, then, under the authorities above cited, such understanding may well form the rule of construction, and the government has not erred in making tribal membership or citizenship the test, especially as the terms of the grant and the treaty are reasonably susceptible of such construction.

In the case of Stephens *v.* Cherokee Nation, 154 U. S. 445, a consolidated case involving the question of membership or citizenship in the Choctaw, Cherokee and Creek Nations, the court say:

"That lands and moneys of these tribes are public lands and moneys, and the assertion by any particular applicant that his right therein is so vested as to preclude enquiry into his status involves a contradiction in terms."

The question of membership in the tribe was one for determination by the tribe until Congress, in the exercise of its plenary
54 power, took that matter into its own hands and empowered the Dawes Commission to act. Its right to do so is now settled beyond controversy by the Supreme Court, in Wallace *v.* Adams, 204 U. S. 423, wherein the court say:

"The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory, it could try another. The fact that

the first provision was by inquiry in a territorial court did not exhaust the power of Congress or preclude further investigation. The functions of the territorial courts in this respect were but little more than those of a commission. While the act of July 1, 1898, provided for an appeal to this court, and appeals were taken in many cases, yet our inquiry stopped with the constitutionality of the legislation. In other words, we entertained and decided the purely judicial question of the validity of the means Congress had adopted for determining the matter of citizenship. We did not attempt to pass upon the question of citizenship in any particular case, nor determine whether the applicant was or was not entitled to be enrolled as a citizen."

Pursuant to the various acts referred to in the bill, and which it is unnecessary here to recite in detail, Congress, through the Dawes Commission and other agencies, proceeded to determine the question of membership in the Choctaw and Chickasaw nations, preliminary to the allotment of tribal lands and property in severalty, and complainants have been excluded therefrom. That the acts of Congress under which this was done are constitutional is no longer open to controversy. (Stephens *v.* Cherokee Nation, 174 U. S. 445; Wallace *v.* Adams, 204 U. S. 415.)

The question of the wisdom or advisability of the methods adopted by Congress in the winding-up of these tribal affairs, as evidenced by said acts of Congress, is not within the province of this court. As said by the Supreme Court, in Cherokee Nation *v.* Hitchcock, 187 U. S. 308,

"We are not concerned in this case with the question of whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise and calculated to operate
55 beneficially to the interest of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

But it is insisted that the agencies employed by Congress in determining the question of citizenship have erred, either through ignorance or gross mistake of law and fact, or by reason of fraud practiced upon or by them or under the influence of bribes given them by interested parties, by reason whereof complainants have been wrongfully excluded from the final rolls of citizenship. If these allegations were established, it could not do more than vitiate or invalidate the present rolls as a finality and make necessary their re-opening for the further consideration of the complainants' claims of membership in the tribes. That would still be an inquiry within the exclusive province of Congress, either through its present agencies or such others as it might adopt. The fact that the means heretofore adopted by Congress to determine the question of citizenship had proven ineffective would not divest Congress of its plenary power to determine this question and transfer that power to the courts. Whatever jurisdiction this court might have, if any, to investigate the accuracy or good faith of these Congressional agencies in the

discharge of the duties imposed upon them by Congress, it is clear that the court has no power to determine the question of citizenship or membership in these tribes. The purpose of determining that question was to establish a basis for the distribution of the lands and moneys of the tribes in severalty, and was but an exercise of the power existing in Congress to administer upon the tribal property, and, as held the Supreme Court in Cherokee Nation *v.* Hitchcock, *supra*, the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

56 It is alleged that Congress was led to pass certain of the acts complained of by reason of fraud practiced or improper influences brought to bear on its committees. That this court cannot enquire into such matters is settled by the case of Lone Wolf *v.* Hitchcock, 187, U. S. 553. In that case a treaty with the Kiowa and Comanche Indians provided that no treaty for the cession of any part of the lands held by them in common should be of any force or validity as against the Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same. Afterwards, Congress passed an act providing for allotment and other disposition of these lands, based upon what purported to be an agreement signed by more than three-fourths of the adult male members, but which, in fact, was signed by less than three-fourths. It was further alleged that the Indians had been led to execute the agreement by false statements and fraud practiced upon them by the representatives of the Government, and the validity of the act was attacked on those grounds, but the court say:

"The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in Cherokee Nation *v.* Hitchcock, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought
57 by an appeal to that body for redress and not to the courts.

The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained."

There still remains the contention that the Dawes Commission and the Citizenship Court, in the exercise of the authority granted them by Congress, were influenced to make erroneous findings as to the right of certain applicants to enrollment by bribes, by reason of ignorance and mistakes of law and fact, and by bad faith on the part of certain members of the commission in the discharge of their duties, whereby complainants were excluded from the rolls. If this court were to find such allegations to be true, that fact, as we have seen, would not clothe it with the power of rendering a decree declaring complainants entitled to enrollment. The power of determining that question is vested exclusively in Congress and the agencies employed by it, and so long as it rests there, any additions to or changes in the rolls or membership must be made in the manner provided by law. Complainants pray that upon final hearing of this cause the right, title and interest of complainants, as well as every other person who can show this court that he or she is of the designated class of persons for whose exclusive use and benefit said grant was made in and to the property in controversy, be by appropriate decree declared, and that the Secretary of the Interior be required to respect said decree in the distribution of all said property remaining under his control. This is the main relief sought by the bill. All other relief prayed is but incidental thereto. Such a decree could only be based upon a finding that complainants are entitled to enrollment, a question, as we have seen, not within the province of this court.

Nor is it conceived how this court could furnish complainants any relief, even were it to find the foregoing allegations of fraud, bribery and mistake of law and fact to be true. In the case of West *v.* Hitchcock, 205 U. S. 80, plaintiffs sought by mandamus pro-
58 ceedings to force the Secretary of the Interior to approve his selection of one hundred and sixty acres as an allotment as a member of the Wichita and affiliated bands of Indians. By the treaty with these Indians it was provided that there should be allotted to each member, both native and adopted, one hundred and sixty acres of land, to be selected by such member, which selections were to be approved by the Secretary of the Interior. Plaintiff was an adopted member of the tribe by intermarriage. The court sustained the lower court in denying the petition, saying:

"The approval of the Secretary, required by the agreement, must include as one of its elements the recognition of the applicant's right. * * * If the Secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right. By alleging that he had denied the application, he did not invoke the revision of his reasons by a court, even when he saw fit to add the date. He raised no question of law, but simply stood on his authority and put forward his decision as final. * * * We doubt if Congress meant to open an appeal to the courts in all cases where an applicant is dissatisfied. Of course the promise of the United States that there shall be allotted one

hundred and sixty acres to each member of the Wichita band may be said to confer an absolute right upon every actual member of the band; but someone must decide who the members are. We already have expressed the opinion that the primary decision must come from the Secretary. There is no indication of an intent to let applicants go farther. There are insuperable difficulties in the way of at least this form of suit, and the Department of the Interior generally has been the custodian of Indian rights."

In the case of DeCambra *v.* Rogers, 189 U. S. 119, DeCambra sought to have annulled a patent of certain lands issued to Rogers, on the grounds that Rogers, who acted for DeCambra in filing his application for entry at the local land office, fraudulently prepared the papers so as to make DeCambra an applicant for land other than DeCambra contemplated he was procuring, Rogers himself filing a pre-emption claim upon the land. It is alleged that upon the discovery of Rogers' fraud by DeCambra, he instituted a contest in the land office, which was finally decided by the Secretary of the Interior in favor of Rogers, and the lands patented to him.
59 It is alleged that, although the decision apparently rendered by the Secretary of the Interior was signed by him, yet in fact, for want of time and opportunity, the Secretary had not read or heard read the evidence in the contested case, and simply signed his name to a report prepared by one of the clerks in the department. Mr. Justice Brewer, in affirming the action of the lower court in sustaining a demurrer to DeCambra's cross-complaint, says:

"It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

In the case of Riverside Oil Company *v.* Hitchcock, 190 U. S. 316, the court say:

"That the decisions of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we would require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed

upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts."

60 In the case at bar we have held that the right of any individual to share in lands and moneys in controversy, except as to freedmen for whom special provision is made, depends upon his membership in either the Choctaw or Chickasaw tribe or nation. The determination of his question of membership rests solely with Congress and such agencies as it may employ. Congress has provided that the evidence of such membership shall be the tribal rolls as finally approved by the Secretary of the Interior. The bill discloses that the Secretary has acted in the matter and that complainants have been excluded from the rolls. In the light of the foregoing authorities in the opinion of this court, that action, so far as this court is concerned is final and cannot be reviewed here. If the Secretary has erred to the injury of complainants, then appeal, if any, is to Congress and not to the courts.

The demurrer to the jurisdiction must therefore be sustained and the bill dismissed, and it is so ordered.

61 In the United States Circuit Court for the Eastern District of Oklahoma, June Term, 1908.

MONDAY MORNING, 10 O'CLOCK, *August 24th*, 1908.

Court met pursuant to adjournment.

Present: The Honorable Ralph E. Campbell, Judge of the District Court of the United States for the Eastern District of Oklahoma.

No. 271. Equity.

JAMES E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Respondents.

This cause having been set down for hearing at a former sitting of this Court, on the demurrers of the respondents to the bill filed herein, and the same having been argued by the counsel for the complainants, as well as for the respondents respectively, also taken under advisement by the Court; and the Court being fully advised in the premises, ordered, decreed, and adjudged that the said demurrers to the bill be, and the same are hereby sustained.

And the complainants then and there by their attorneys in open court having declined to amend their bill further, it is therefore ordered, adjudged and decreed by this court that the bill of complainants be, and the same is hereby dismissed at the cost of the

complainants to be taxed, and for which execution may issue, to all of which counsel for complainants duly then and there in open court excepted and prayed an appeal.

Ordered and decreed this 24th day of August 1908.

62 In the United States Circuit Court for the Eastern District of Oklahoma.

In Equity. No. 271.

J. E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Respondents.

Petition for Allowance of Appeal from Circuit to Supreme Court of the United States Direct on Question of Jurisdiction.

Your petitioners, J. E. Fleming *et al*, respectfully represent that there is manifest error committed, to the injury of the petitioners by the final decree pronounced in this cause on the 24th day of August, 1908, in and by which said final decree this court refused jurisdiction of the cause set forth in your petitioners' bill of complaint, on the following grounds;

(1) That complainants had no vested rights under certain treaties with the United States in and to the property in controversy.

(2) That certain provisions of certain acts of Congress denying to certain of complainants their alleged property rights were constitutional enactments.

(3) That the said court was without jurisdiction to entertain said suit brought by certain private parties, citizens of the United States, as complainants, against other private parties, also citizens of the United States, as respondents, for the purpose of determining property rights acquired under and by virtue of certain treaties with the United States, or to determine the constitutionality of certain acts of Congress affecting the property in controversy, to review
63 the acts of the Secretary of the Interior, after his jurisdiction had ceased and terminated, for the purpose of ascertaining and determining whether the acts complained of were according to law, because the matters and things sought to have said court determine were political in their nature and not cognizable by a court of equity; upon which grounds said court entered a final decree dismissing said action for want of jurisdiction.

Wherefore your petitioners, J. E. Fleming, *et al.*, considering themselves aggrieved, pray an order granting an appeal from said final decree denying the jurisdiction, as aforesaid, to the Supreme Court of the United States, as authorized by section 5 of the act of Congress of the United States, approved March 3, 1891, and pray this honorable court that said appeal be allowed upon said question of jurisdiction, and that a transcript of the entire record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioners herewith file and offer their bond in the penal sum of Five hundred dollars, and ask that the same be approved, and that the appeal be allowed.

JOHN G. CARLISLE,
WEBSTER BALLINGER,
ALBERT J. LEE,
Solicitors for Complainants.

(Endorsed:) Filed Sept. 2nd, 1908. L. G. Disney, Clerk, by Florence Hammersly, D. C.

64 United States Circuit Court, Eastern District of Oklahoma, June Term, 1908.

WEDNESDAY MORNING, 10 O'CLOCK, *Sept. 2nd*, 1908.

Ralph E. Campbell, Presiding Judge.

Equity. No. 271.

J. E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Defendants.

The complainants' bill having been dismissed by decree of this court on the sole ground that the court had no jurisdiction of the action; and the complainants having prayed an appeal to the Supreme Court of the United States on said question of jurisdiction, it is now ordered in open court that the appeal be allowed on that question only; and it is further ordered that the entire record and proceedings and papers upon which said order and decree was made be included in the record on appeal.

65 In the United States Circuit Court Eastern District of Oklahoma.

Equity. No. 271.

J. E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Respondents.

Assignment of Error.

Come now the above named complainants by John G. Carlisle, Webster Ballinger and Albert J. Lee, their counsel, and say that in the record and proceedings in the above entitled cause there is manifest error, in this, to wit;

1. The Circuit Court of the United States, Eastern District of Oklahoma, erred in sustaining respondents' demurrers to the juris-

diction of said court to hear and determine the matters and things set out in complainants' bill.

2. The said court erred in holding that it was without juri-diction to hear and determine this cause, notwithstanding the rights claimed by complainants, as set out in the bill of complaint, were dependent upon the construction of treati s with the United States under one of which treaties the property in controver-y was granted.

3. The court erred in holding that the grant in fee simple of the property in controversy by patent from the United States, issued in pursuance of a treaty with the United States, as set out in the bill of complaint, did not confer upon complainants such rights in said property as would entitle them to have their claims thereto determined by a court of equity.

4. The court erred in holding that it was without jurisdiction to hear and determine this cause for the reason that complainants had no vested rights, under the treaties of 1830 and 1837 and the grant made pursuant to the treaty of 1830, in the property in controversy.

5. The said court erred in holding that the Secretary of the Interior could construe complainants' rights secured to them
66 under treaties with the United States, and that the construction thereof by said Secretary was final and not reviewable by a court of equity.

6. The said court erred in holding that the questions presented for determination by complainants' bill were political in their nature and not cognizable by a court of equity.

7. The said court erred in holding that it was without jurisdiction to entertain a suit brought by private parties, citizens of the United States, as complainants, against other private parties, citizens of the United States, as respondents, affecting individual rights in the property in controversy.

8. The said court erred in holding that certain provisions of certain Acts of Congress affecting the property rights claimed by certain of complainants were constitutional enactments.

9. The said court erred in holding that the acts of the Secretary of the Interior, which resulted in the denial to complainants of their property rights, and which acts complainants alleged in their bill were based upon error of law, mistake of fact, and actual fraud committed by the administrative officers were not reviewable by a court of equity after the jurisdiction of the said Secretary had ceased and terminated, for the purpose of ascertaining and determining whether said acts complained of were according to law.

10. The said court erred in holding that the acts of the Secretary of the Interior under which many of the respondents, as alleged in the bill of complaint, unlawfully secured rights in the property in controversy were not reviewable by a court of equity, after the jurisdiction of the said Secretary had ceased and terminated, for the purpose of ascertaining whether the acts complained of were according to law.

67 11. The said court erred in holding that the Secretary of the Interior had any jurisdiction whatever over the property in controversy.

12. The said court erred in sustaining the demurrers, dismissing complainants' bill and refusing the relief prayed for.

Wherefore complainants pray that the judgment of said Circuit Court of the United States, Eastern District of Oklahoma, be in all things reversed.

JOHN G. CARLISLE,
WEBSTER BALLINGER,
ALBERT J. LEE,
Counsel for Complainants.

(Endorsed:) Filed Sept. 2, 1908. L. G. Disney, Clerk by Florence Hammersly, D. C.

68 In the United States Circuit Court Eastern District of Oklahoma.

Equity. No. 271.

J. E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Respondents.

Bond on Appeal.

Know all men by these presents:

That we, J. E. Fleming, principal complainant, and D. H. Dawson and J. W. Ayler, Jr., as sureties, are held and firmly bound unto the above named respondents, Green McCurtain, Douglas H. Johnston, Mansfield, McMurray & Cornish, and James R. Garfield, Secretary of the Interior, in the penal sum of $500.00, to be paid to the said respondents, their heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and separately, firmly by these presents.

Sealed with our seals and dated this 31st day of August, in the year of our Lord, one thousand nine hundred and eight.

Whereas, the above named complainants, J. E. Fleming *et al*, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Eastern District of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above named complainants, J. E. Fleming, *et al.*, shall prosecute said appeal to effect and answer all damages and costs if they shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

69 (Signed) J. E. FLEMING, [SEAL.]
"By WEBSTER BALLINGER,
His Attorney.

(Signed) D. H. DAWSON, [SEAL.],
" J. W. AYLER, JR. [SEAL.]

Sealed and delivered and taken and acknowledged this 31st day of August, 1908, before me Essie Majors, a notary public, in and for Carter County, State of Oklahoma.

ESSIE MAJORS, *Notary Public.*

The foregoing bond is approved this 1st day of September, 1908.

(Signed) RALPH E. CAMPBELL,
District Judge, and one of the Circuit Judges of the Eighth Judicial Circuit, Eastern District of Oklahoma.

[Endorsed:] Filed Sept. 2 1908 L. G. Disney, Clerk By Florence Hammersly, D. C.

70 In the United States Circuit Court, Eastern District of Oklahoma.

In Equity. No. 271.

J. E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Respondents.

Papers and Documents to be Included in Record.

The above named complainants, having petitioned this court for an appeal from the order and decree made in said cause on the 24th day of August, 1908, dismissing their bill for want of jurisdiction on the following grounds:

(1) That complainants had no vested rights under certain treaties with the United States in and to the property in controversy.

(2) That certain provisions of certain Acts of Congress denying to certain of complainants their alleged property rights were constitutional enactments.

(3) That the said court was without jurisdiction to entertain said suit brought by certain private parties, citizens of the United States, as complainants, against other private parties, also citizens of the United States, as respondents, for the purpose of determining property rights acquired under and by virtue of certain treaties with the United States, or to determine the constitutionality of certain acts of Congress affecting the property in controversy, or to review the acts of the Secretary of the Interior, after his jurisdiction had ceased and terminated, for the purpose of ascertaining and determining whether the acts complained of were according to law, because the matters and things sought to have said court determine were political

71 in their nature and not cognizable by a court of equity; upon which grounds said court entered a final decree dismissing said action for want of jurisdiction; and such appeal having, by order of this court, been granted on said grounds, and the further order made therein that the entire record and proceedings and

papers upon which said decree was made be included in the record on appeal to the Supreme Court of the United States;

Now, therefore, it is hereby ordered that the following pleadings, proceedings and documents on file in said cause be included in the record on said appeal:

(1) The citation to be issued herein requiring respondents to appear in the Supreme Court of the United States on this appeal, and proof of service thereof.

(2) The bill of complaint omitting therefrom the names of complainants after the name of "Annie Huff", appearing on the first page of said complaint; so that this portion of the complaint to be printed will read "Complaint for himself and for and on behalf of Annie Huff" (and about thirteen thousand other persons enumerated by name in the Bill of Complaint filed herein, but whose names are omitted from the printing of this record) "all persons of Choctaw and Chickasaw Indian blood and descent", etc., and that the remainder of said Bill of Complaint shall be printed in full.

(3) The *subpœnae* issued to the respondents and proof of its service.

(4) The demurrers of the respondents filed to said bill.

(5) The opinion of Campbell, District Judge, on the demurrers to the said bill of complaint.

72 (6) All minutes of the Court, and orders and decree made in this case.

(7) The petition for appeal, order of the court granting such appeal, and the appeal allowed, the assignment of errors of the complainants upon this appeal, the undertaking on appeal, and all orders of the Court and the judge in chambers relating thereto.

(8) The certificate of the clerk to the correctness of the record in this appeal.

(9) All endorsements of filings, and acknowledgements and proof of service, of pleadings, and other documents filed in the cause and mentioned above.

September 2, 1908.

(Signed) RALPH E. CAMPBELL,
District Judge and one of the Circuit Judges of the Eighth Judicial Circuit, Eastern District of Oklahoma.

73 UNITED STATES OF AMERICA.
Eastern District of Oklahoma, ss:

I, Loren G. Disney, Clerk of the Circuit Court of the United States of America, for the Eastern District of Oklahoma, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in the case of J. E. Fleming *et al., vs.* Green McCurtain *et al.* Equity No. 271 as the same appears on file and of record in this office, with the exception of the names of Complainants for and on whose behalf this suit is brought numbering about 13,000 and which are omitted herefrom by order of Court.

In testimony whereof, I have hereunto set my hand and affixed the

seal of said Court, at my office in Muskogee, in said District, this 2nd day of September A. D. 1908.

[Seal of the United States Circuit Court, Eastern District of Oklahoma.]

L. G. DISNEY, *Clerk.*
By FLORENCE HAMMERSLY, *D. C.*

I further certify that all costs in above entitled cause have been fully paid.

L. G. DISNEY, *Clk.*
By FLORENCE HAMMERSLY, *D. C.*

74 In the United States Circuit Court, Eastern District of Oklahoma.

In Equity. Number 271.

J. E. FLEMING ET AL., Appellants,
vs.
GREEN MCCURTAIN ET AL., Appellees.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Green McCurtain, Appellee:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia on the 30th day of September, A. D., 1908, pursuant to an order allowing appeal filed and entered in the clerk's office of the Circuit Court of the United States for the Eastern District of Oklahoma, from a final decree signed, filed and entered on the 24th day of August, 1908, in that certain suit, being in equity, number 271, wherein J. E. Fleming, *et al.*, are complainants and appellants, and you are respondent and appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ralph E. Campbell, United States District Judge and one of the judges of the United States Circuit Court for the Eighth Judicial Circuit in and for the Eastern District of Oklahoma, this 1st day of September, 1908, and of the inde-
75 pendence of the United States the one hundred and thirty-third.

RALPH E. CAMPBELL,
United States District Judge for the Eastern District of Oklahoma.

Service of the foregoing citation is hereby acknowledged this 21 day of September, 1908.

McCURTAIN & HILL,
By E. P. HILL,
Attorneys for Appellee, Green McCurtain et al.

76 |Endorsed:| In Equity No. 271. In the United States Circuit Court, Eastern District of Oklahoma. J. E. Fleming, *et al.*, Appellants *vs.* Green McCurtain, *et al.*, Appellees. Citation on appeal.

77 In the United States Circuit Court, Eastern District of Oklahoma.

In Equity. Number 271.

J. E. FLEMING ET AL., Appellants,
vs.
GREEN McCURTAIN ET AL., Appellees.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Mansfield, McMurray and Cornish, Appellees:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia on the 30th day of September, A. D., 1908, pursuant to an order allowing appeal filed and entered in the clerk's office of the Circuit Court of the United States for the Eastern District of Oklahoma, from a final decree signed, filed and entered on the 24th day of August, 1908, in that certain suit, being in equity, number 271, wherein J. E. Fleming, *et al.*, are complainants and appellants, and you are respondent and appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ralph E. Campbell, United States District Judge and one of the judges of the United States Circuit Court for the Eighth Judicial Circuit in and for the Eastern District
78 of Oklahoma, this 1st day of September, 1908 and of the independence of the United States the one hundred and thirty-third.

RALPH E. CAMPBELL,
United States District Judge for the Eastern District of Oklahoma.

Service of the foregoing citation is hereby acknowledged this 7th day of September, 1908.

STUART & GORDON,
Attorneys for Appellees, Mansfield, McMurray and Cornish, and The Choctaw Nation.

79 [Endorsed:] In Equity No. 271. In United States Circuit Court, Eastern District of Oklahoma. J. E. Fleming, *et al.*, Appellants, *vs.* Green McCurtain, *et al.*, Appellees. Citation on appeal.

80 In the United States Circuit Court, Eastern District of Oklahoma.

In Equity. Number 271.

J. E. Fleming et al., Appellants,
vs.
Green McCurtain et al., Appellants,

Citation on Appeal.

United States of America, *ss:*

To James R. Garfield, Appellee:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia on the 30th day of September, A. D., 1908, pursuant to an order allowing appeal filed and entered in the clerk's office of the Circuit Court of the United States for the Eastern District of Oklahoma, from a final decree signed, filed and entered on the 24th day of August, 1908, in that certain suit, being in equity, number 271, wherein J. E. Fleming, *et al.*, are complainants and appellants, and you are respondent and appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ralph E. Campbell, United States District Judge and one of the judges of the United States Circuit Court for the Eighth Judicial Circuit in and for the Eastern District of Oklahoma, this 1st day of September, 1908, and of the inde-
81 pendence of the United States the one hundred and thirty-third.

RALPH E. CAMPBELL,
United States District Judge for the Eastern District of Oklahoma.

Service of the foregoing citation is hereby acknowledged this 8 day of September, 1908.

CHARLES W. RUSSELL,
Attorneys for Appellee James R. Garfield.

82 [Endorsed:] In Equity No. 271. In the United States Circuit Court, Eastern District of Oklahoma. J. E. Fleming, *et al.*, Appellants *vs.* Green McCurtain, *et al.*, Appellees. Citation on Appeal.

83 In the United States Circuit Court, Eastern District of Oklahoma.

Equity. Number 271.

J. E. FLEMING ET AL., Complainants,
vs.
GREEN MCCURTAIN ET AL., Respondents.

Acceptance of Service of Citation.

I, Douglas H. Johnston, one of the respondents in the above entitled cause, hereby accept service of the citation issued on the 1st day of September, 1908, by the Honorable Ralph E. Campbell, United States District Judge for the Eastern District of Oklahoma, and one of the judges of the United States Circuit Court for the Eighth Circuit, pursuant to an order allowing an appeal, filed and entered in the clerk's office of the Circuit Court of the United States for the Eastern District of Oklahoma, from a final decree signed, filed and entered on the 24th day of August, 1908, in that certain suit being in equity, number 271, wherein J. E. Fleming, *et al.*, are complainants and appellants, and Green McCurtain, *et al.*, are respondents and appellees, and in which citation said respondents were cited and admonished to appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia on the 30th day of September, A. D., 1908, to show cause, if any there be, why the decree rendered against the said appellants as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand this 26th day of September, 1908.

DOUGLAS H. JOHNSTON,
One of the Respondents in the Above Entitled Cause, and Governor of the Choctaw Nation.

[Endorsed:] In the U. S. Circuit Court, Eastern District Oklahoma. J. E. Fleming *et al.*, Complainants, *vs.* Green McCurtain *et al.*, Respondents. Acceptance of Service of Citation.

Endorsed on cover: File No. 21,331. E. Oklahoma C. C. U. S. Term No. 535. J. E. Fleming *et al.*, appellants, *vs.* Green McCurtain, Douglas H. Johnston, George Mansfield *et al.* Filed September 14th, 1908. File No. 21,331.

Office Supreme Court, U. S.
FILED.
OCT 19 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

No. 253.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD ET AL., APPELLEES.

Motion to Advance and Set Cause for Hearing.

JOHN G. CARLISLE,
WEBSTER BALLINGER,
Counsel for Appellants.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

No. 535.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD ET AL., APPELLEES.

Motion to Advance and Set Cause for Hearing.

Come now John G. Carlisle and Webster Ballinger, attorneys for appellants in the above entitled cause, and move this honorable court that this cause be advanced under rule thirty-two of the rules of this honorable court and set for hearing on the first Monday in December.

The above and foregoing motion is based upon the statement of counsel for appellants hereto annexed, and made a part hereof.

Dated Washington, D. C., October ~~12~~ 19, 1908.

JOHN G. CARLISLE,
WEBSTER BALLINGER,
Attorneys for Appellants.

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Statement.

This cause comes before this honorable court on appeal from the judgment of the Circuit Court of the United States for the Eastern District of Oklahoma dismissing complainants' (herein appellants') bill of complaint for want of jurisdiction to hear and determine the property rights of complainants claimed under certain treaties with, and laws of the United States, and the grant by which the title to the property in controversy passed from the Government of the United States.

The validity of certain acts of Congress of two agreements with the Choctaw and Chickasaw Indian Nations and the acts of all the administrative officers is in issue, as is also the construction of two treaties with said Indian Nations.

The title to about fourteen million acres of land, comprising the territory occupied by the Choctaw and Chickasaw Indians in the State of Oklahoma, which is thickly settled, is in issue, as well as the ownership of large trust funds now on deposit in the Treasury of the United States.

Property rights of approximately fifty thousand citizens of the United States are directly involved.

Persons to whom allotments of land have been made, the validity of which is denied by appellants, are now selling and disposing of said allotted lands.

This suit has cast a cloud upon the title to all the property in the Choctaw and Chickasaw Indian Nations, and is greatly retarding the development of this country. It is of the utmost importance directly to upwards of half million people residing on this land and indirectly to the people of the United States that this suit should be determined at the earliest practicable date.

JOHN G. CARLISLE,
WEBSTER BALLINGER,
Counsel for Appellants.

Office Supreme Court, U. S.
FILED.
JUN 1 1909
JAMES H. McKENNEY,
Clerk.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

No. 263.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGHLAS H. JOHNSTON, GEORGE MANSFIELD ET AL., APPELLEES.

Motion to Substitute Richard A. Ballinger, Successor to James R. Garfield, Secretary of the Interior, as Appellee.

JOHN G. CARLISLE,
WEBSTER BALLINGER,
Solicitors for Appellants.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

No. 535.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGHLAS H. JOHNSTON, GEORGE MANSFIELD ET AL., APPELLEES.

Motion to Substitute Richard A. Ballinger, Successor to James R. Garfield, Secretary of the Interior, as Appellee.

Come now the appellants by their solicitors, John G. Carlisle and Webster Ballinger, and respectfully show to this Honorable Court that one of the appellees in the above-entitled cause, James Rudolph Garfield, who was sued in his official capacity as Secretary of the Interior of the United States, retired from said office on or about March 4, 1909, and was succeeded by Richard A. Ballinger who is now Secretary of the Interior.

WHEREFORE appellants move that the name of Richard A. Ballinger be substituted for that of James Rudolph Garfield, as Secretary of the Interior of the United States as one of the appellees in said cause.

Dated at Washington, D. C., June , 1909.

JOHN G. CARLISLE,
WEBSTER BALLINGER,
Solicitors for Appellants.

No. 635 253.

In the Supreme Court of the United States

October Term, 1905.

[redacted]

[redacted]

MOTION TO ADVANCE.

In the Supreme Court of the United States

OCTOBER TERM, 1908.

J. E. FLEMING ET AL., APPELLANTS,
v.
GREEN MCCURTAIN, DOUGLAS H. Johnston, George Mansfield et al. } No. 535.

MOTION TO ADVANCE.

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Oklahoma, entered on August 24 last, sustaining a demurrer to the jurisdiction of that court and dismissing a bill which sought to enjoin the Secretary of the Interior from making further allotments of the lands of the Choctaw and Chickasaw nations to persons whose names appear upon the citizenship or freedmen rolls of said nations, as approved by the Secretary on March 4, 1907; to enjoin him from approving or delivering patents for any such lands; from paying out any of the funds of said nations; from interfering with any of the complainants now in possession of any of said lands, etc.

On October 19 last, a motion to advance this case on the docket was submitted by Mr. Webster

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Ballinger, and on October 26 the motion was denied.

The act of March 3, 1909 (the Indian appropriation act), contains the following provision:

> That the Attorney-General of the United States is hereby authorized and directed to immediately move the advancement, upon the docket of the Supreme Court of the United States, of the case of J. E. Fleming, and others, against Green McCurtain, and others, docket numbered five hundred and thirty-five to the earliest practicable hearing.

In accordance with this provision the Attorney-General submits this motion to advance the case upon the docket.

GEORGE W. WICKERSHAM,
Attorney-General.

MARCH, 1909.

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Office Supreme Court, U. S.
FILED.
OCT 8 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 253.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGHLAS H. JOHNSTON, GEORGE MANSFIELD ET AL.

Statement and Argument of Appellants.

JOHN G. CARLISLE,
FRANK HAGERMAN,
WEBSTER BALLINGER,
ALBERT J. LEE,
Solicitors for Appellants.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 253.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGHLAS H. JOHNSTON, GEORGE MANSFIELD ET AL.

Statement and Argument of Appellants.

APPELLANTS' STATEMENT.

1. The Appeal.

This appeal (Rec., p. 42) seeks to reverse the action of the United States Circuit Court for the Eastern District of Oklahoma upon an elaborate opinion (Rec., pp. 28–40) of Judge Campbell sustaining (Rec., pp. 40, 41) demurrers (Rec., pp. 26, 27, 28) to a bill in equity upon the ground that the court had no jurisdiction thereof.

2. General Nature of the Bill.

(1st) Appellants, as complainants, to the number of 13,000 persons of Choctaw or Chickasaw Indian blood, excluded by either the Dawes Commission and the Secretary of the Interior or by a legislative commission known as the Choctaw-Chickasaw Citizenship Court, from participation in the distribution of the common property of the Choctaws and Chickasaws, consisting of lands

located in the now State of Oklahoma and funds derived from the sale of certain other lands which were a part of the common property of said Indians, sought to have their rights established and enforced, to which end they filed a bill (Rec., pp. 1, 2) in the United States Circuit Court for the Eastern District of Oklahoma against (*a*) Green McCurtain and Doughlas H. Johnston as representatives of all that class of persons whose names appear on the "Citizenship" and "Freedmen" rolls of the Choctaw and Chickasaw tribes as approved by the Secretary on or before March 4, 1907; (*b*) Mansfield, McMurray & Cornish, attorneys for such class, and (*c*) Richard A. Ballinger (successor to James R. Garfield), Secretary of the Interior, herein called the Secretary.

(2d) The bill rests upon this basis:

(*a*) Pursuant to the treaties of September 27, 1830 (7 Stat. L., 333), and January 17, 1837 (11 Stat. L., 573), the President of the United States, on March 23, 1842, issued a patent vesting the legal title to the property in controversy in the Choctaw Nation to be held by it in *trust for the exclusive use and benefit of the individual members of the Choctaw and Chickasaw tribes at the time the treaties were ratified and their descendants*, constituting a designated class of people.

(*b*) Appellants being either then blood members of the tribes or their descendants, and members of said designated class, had vested in them an equitable title to an undivided individual interest in the common property and whenever the tribal relations ceased or the property was no longer used as a common home for all and for the equal benefit of each member of said designated class and distribution occurred they were entitled to have set apart to each of them a distributive share.

(*c*) The United States, by a series of acts, dissolved and dismembered the Choctaw and Chickasaw nations or tribes and directed *legislative* courts and commissions

to ascertain all those persons entitled under the *treaties* to distributive shares in the property and to place their names on tribal rolls which were to be used as a basis of distribution. The law (act of June 28, 1898, section 21, 30 Stat., 502) further directed the commission to enroll *all persons* of Choctaw or Chickasaw Indian *blood*, and especially all those persons whose names rightfully appeared on the *tribal rolls "and their descendants born since such rolls* were made." "The rolls *so made*, when approved by the Secretary of the Interior," were to be final. The administrative officers, acting under these statutes, proceeded, contrary to the provisions of the law and the instructions of the Department, upon the theory that the property belonged to the nations, and being national in its nature there was no existing individual right therein; that only such persons as the then tribal officials saw fit to recognize as "citizens of the tribes" under tribal laws, usages, and customs, were entitled to enrollment. Thus, appellees, regardless of blood or treaty rights, were enrolled and given distributive shares of the lands, because they were recognized by the tribal officials at the time the rolls were made as entitled to political rights as *citizens* under tribal laws, usages, and customs, while appellants, who were blood Indians of the designated class mentioned in article 2, of the treaty of 1830 and whose names, or the names of their immediate ancestors, appear on the official rolls of the tribes, were denied enrollment.

(d) In cases where appellants were blood Indians, recognized by the tribal officials as entitled to full political rights, which they had always freely exercised, they were excluded as the result of bribery of administrative officers from whose finding or decision there was no appeal. The remainder of appellants were denied enrollment as the result of fraud, bribery, misconception of duty, and mistake of law and fact on the part of the

administrative officers whose acts were, owing to the limitation of time in which the Secretary had to act, pro forma approved by him.

(*e*) To prevent this exclusion the bill was filed, the claims asserted being:

First. All the property should have been divided between those only who were members of said designated class consisting of all those persons who were members of the Choctaw community on the day the treaty of September 27, 1830 was ratified and their descendants, and all those Chickasaws who were members of the Chickasaw tribe on the day the treaty of January 17, 1837 was ratified and their descendants.

Second. Even if appellants had no higher rights than tribal relations or "citizenship" in the tribes at the time of dissolution, still the administrative officers of the Government should be enjoined from ignoring them when this is the result of fraud, bribery, and misconception of duty.

3. The Decision of the Court Below.

The court below (Rec., pp. 28–40), in dismissing the bill held:

First. Appellants had no vested rights under any treaty, or statute; and,

Second. Having no such vested rights could not, as tribal members, complain of the acts of the administrative officers in making distribution of the tribal property, even though the distribution was contrary to the terms of the statute and accomplished through fraud and bribery of the administrative officers.

4. Appellants' Claim of Title.

Having seen the general nature of the claim asserted by, and denied to, appellants, we proceed to a more detailed statement of the case, starting with their claim of title:

(*a*) By what is known as the Choctaw Treaty of Danc-

ing Rabbit Creek of September 27, 1830 (7 Stat. L., 333), the United States for a valuable consideration agreed to convey the property in controversy to the Choctaw Nation in trust for the exclusive use of its then living members and their descendants, the trust to continue to enure to the benefit of descendants so long as said Indians and their descendants should maintain a national tribal existence and live on the land, but upon the happening of either of these contingencies the fee should no longer be held in trust and enure but should pass to and vest in the then living members of said designated class of persons (Rec., p. 2, Par. I).

(*b*) Upon January 17, 1837, prior to the execution of the provisions of the treaty of Dancing Rabbit Creek, at the solicitation of the United States, the Choctaws and Chickasaws entered into a treaty, ratified by the Senate on March 24, 1837 (11 Stat. L., 573), by which the Chickasaws became merged with the Choctaws to the end that its members and their descendants were to participate equally with the Choctaws in the property to be so conveyed (Rec., p. 2, Par. II).

(*c*) Pursuant to the above treaties, the President, on March 23, 1842, by letters patent, conveyed the property in fee simple to the Choctaw Nation to be held in trust for the exclusive use and benefit of its then members and their descendants (Rec., p. 3, Par. III).

5. Appellants' Claim of Vested Rights.

Appellants were, at the time of the treaty of 1830 and the patent of 1842, actual members of the tribes or are now *the* actual *descendants* of such members, and as such, had vested in them the equitable title to the land in question, so that upon the *dissolution* of the *nations* or *tribes* and the *termination* of the *trust* they had an indefeasible title to an undivided individual interest in

all the trust property, both lands and moneys, which was a part of or which resulted from said grant (Rec., p. 3, Pars. IV, V, VI).

6. Legislation Abolishing the National or Tribal Governments.

By a series of enactments, acts of March 1, 1889 (25 Stat. L., 783), May 2, 1890 (26 Stat. L., 93, 4, 5, 6, 7, 8, 9), March 1, 1895 (28 Stat. L., 696, 7, 8), June 7, 1897 (30 Stat. L., 83), June 28, 1898 (30 Stat. L., 495, 496, 504, 511), March 3, 1901 (31 Stat. L., 1447), April 26, 1906 (34 Stat. L., 267, 275), Congress terminated the *national* or tribal existence of the Choctaw and Chickasaw nations and relegated the members of those tribes to the State and federal courts, for protection of their life, liberty, and property, including their rights in and to the property held in common.

7. First Legislation Directing the Preparation of Correct Rolls Containing the Names of all Those Persons Having Existing Rights in the Property Under the Treaties.

PRELIMINARY REPORTS TO CONGRESS.

(*a*) Ineffectual efforts were made by the Dawes Commission under the acts of March 3, 1893 (27 Stat. L., 645), and March 2, 1895 (28 Stat. L., 939), to induce the Choctaws and Chickasaws to agree to the sale of the whole or any part of their lands to the United States, or for the division of the trust property among the members thereof upon a basis of "justice and equity" (Rec. p. 4, Par. VIII). The commission under dates of November 20, 1894 (S. Doc. 182, 54th Cong., 1st Ses., pp. 89 to 92, inclusive), and November 18, 1895 (S. Doc. 12, 54th Cong., 1st. Ses., pp. 15 to 20, inclusive), respectively, officially informed Congress that the *legal title* to the property (being the identical property in controversy)

was held by the tribes, under *treaty* stipulations, in *trust* for all the people having *rights* therein under the *treaties*; that—

> "Corruption of the grossest kind, open and unblushingly practised, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all *mixed* bloods and adopted *whites*, who have so administered their affairs and enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the territory of any kind that can be rendered profitable and valuable."
>
> S. Doc. 182, 54th Cong., 1st Ses., p. 90.

Further, that the citizenship rolls of the tribes had become—

> "a political football, and names have been *stricken* from it and *added* to it and *restored* to it, without *notice* or *rehearing* or power of *review*, to answer *political* or *personal* ends and with entire disregard of *rights* affected thereby. Many who have long enjoyed all the acknowledged *rights* of *citizenship* have, without warning, found themselves thus *decitizenized* and deprived both of political and *property* rights pertaining to such citizenship."
>
> S. Doc. 12, 54th Cong., 1st Ses., p. 16.

The commission then in an urgent appeal to Congress recommended "immediate legislation as follows:"

> 1. "A Territorial government over the Five Civilized Tribes, adapted to their peculiarly anomalous conditions, so framed as to secure all rights

of residents in the same, and without impairing the *vested* rights of the citizen Indian or other person not an intruder.

2. "The extension of the jurisdiction of the United States courts in the Territory, both in law and equity, to hear and determine all controversies and suits of any nature concerning any right in or use and occupation of the tribal lands of the several nations, to which any citizen Indian or other person, or the tribal government of any nation, is or may be made a party plaintiff or defendant."

S. Doc. 12, 54th Cong., 1st Ses., p. 20.

On March 29, 1894, the Senate adopted a resolution directing the Committee on the Five Civilized Tribes of Indians to "inquire into the present conditions of the Five Civilized Tribes of Indians," and "the legislation required and appropriate to meet the needs and welfare of such Indians" and to report to the Senate thereon. On May 7, 1894, the committee, after personally visiting Indian Territory reported (S. Rep., 377, 53rd Cong., 2nd Ses.) to the Senate an intolerable condition existing similar to that described in the reports of the Dawes Commission, and emphasized the necessity of federal interference in order to enforce the *trusts* in conformity with the terms of the *treaties* creating the *trusts*.

In response to these urgent appeals Congress enacted the following legislation:

(b) *Act of June 10, 1896.*

This act (29 Stat. L., 321) continued the commission and directed it to receive applications of all persons "who may apply to them for citizenship in any of said nations" within three months from the date of its passage, and to decide each application within ninety days after its submission according to the existing *treaty* rights

of the claimant. The "rolls of citizenship" of the Five Tribes were confirmed and any person who claimed that his name should be added thereto was authorized to within three months from June 10, 1896, apply to the legally constituted court or committee designated by the respective tribe in which he claimed citizenship, which court or committee was directed to determine each application within thirty days after its submission according to the claimants *treaty* rights. Either party aggrieved at the decision of the commission or the tribal authorities could appeal to the United States District Court within sixty days, the decision of which latter tribunal was to be final.

(c) *Act of June 7, 1897.*

By this act (30 Stat. L., 84), the words "rolls of citizenship" as used in the preceding act were "construed to mean the last authenticated rolls of each tribe, which have been approved by the council of the nation and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of June 10, 1896. Any name appearing on any roll and not confirmed by the act of June 10, 1896, was subject to investigation by the commission, with the right of appeal to the United States District Court.

8. Action of the Commission and Courts Under Said Legislation Resulting in the Exclusion of a Part of Appellants.

(*a*) There being no "confirmed" rolls of the Choctaws and Chickasaws both acts were inoperative so far as they related to these two tribes (Rec., p. 4, Par. IX. & Laws Affecting Five Tribes, 1893–1906, p. 158).

(*b*) Because of the limitation of time for the submission and consideration of applications, and the refusal of the great majority of the Choctaws and Chickasaws to recognize the authority of the Government to interfere in their tribal affairs, these laws proved ineffective. Of the applications submitted to and acted upon by either the Commission or the tribal authorities appeals were taken to the United States District Court in cases involving the rights of about 5,000 Choctaw or Chickasaw claimants (Rec., p. 4, Par. IX).

(*c*) Thereafter, the attorneys for the two tribes, Mansfield, McMurray & Cornish, carefully examined said judgments and reported their findings to the court with the result that 140 names which had been erroneously or fraudulently included therein were stricken, by order of the court, therefrom (Rec., p. 7, Par. XII).

(*d*) Thereafter under an act approved July 1, 1898 (30 Stat. L., 591), appeals were taken from the decisions of the United States District Court in a large number of cases direct to the Supreme Court of the United States, which court affirmed said judgments (174 U. S., 445, 43 L. Ed., 1041; Rec., p. 7, Par. XII).

(*e*) Subsequently, and on January 17, 1901, an inchoate contract was secretely entered into between the attorneys for the tribes, Mansfield, McMurray & Cornish, who were then receiving an annual salary of $10,000 and expenses aggregating about $5,000 per annum from said tribes, and the principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation. By this inchoate contract these attorneys agreed to prevent the persons whose names were included in said judgments from receiving any part of the common property, and as compensation for said services the attorneys were to receive nine per cent of the amount each such person would receive if the judgments remained intact. It was further agreed that the value of each such share should

be fixed at $4,800. Thereafter these attorneys went to Washington and fraudulently represented to the committee of Congress that all of said claimants had procured their judgments by fraud and that as a result of said representations Congress by act approved July 1, 1902 (secs. 31, 32, 33; 32 Stat. L., 645-7-8-9), provided for the creation of a legislative commission to be known as the Choctaw-Chickasaw Citizenship Court, which commission was authorized to pass upon two questions of law which had theretofore been previously determined by the United States District Court in Indian Territory, and its decision affirmed by the Supreme Court of the United States. The act provided that if this legislative commission found that the courts had erred in their determination of the two questions of law, it should render a finding to that effect, and that said finding should operate to vacate and annul all the judgments rendered by the United States District Court in favor of about said 4,000 claimants and that this commission should then proceed to try de novo all of such cases as were thereafter brought before it for decision. Shortly after this legislative commission was constituted it rendered a finding against the claimants upon both questions of law and thereafter proceeded to hear and determine the claims of each of the 3,304 claims brought before it for decision, and rendered findings holding all but 156 of said persons not entitled to "citizenship" in said nations. Upon the rendition of its findings in these cases it awarded said firm of attorneys a fee of $750,000, which was paid out of the trust funds. Appellants allege that said findings were the direct result of the bribery of members of the legislative commission and that Spencer B. Adams and Henry S. Foote, two of its members, received a part of the $750,000 fee awarded to said firm of attorneys (Rec., pp. 7, 8, 9, Par. XIII).

(*f*) The findings of this legislative commission were final so far as the administrative officers of the Government were concerned, and notwithstanding the facts with reference to the bribery of this commission, were brought to the attention of the then Secretary of the Interior (Secretary Garfield), no investigation was instituted and the Department refused to afford appellants any relief (Rec., p. 17, Par. XXIV).

(*g*) The findings of this legislative commission are claimed to be void, first, because appellants are *blood citizens* of said tribes within the meaning of the treaties and the statute, and as such had *vested* rights in the property and the action of this commission in denial thereof, was not *due process* of law; and second, because said findings were the direct result of bribery.

(*h*) Only a part of appellants were, however, by this legislative commission denied all relief.

9. Subsequent Legislation Directing Commission to Make Correct Rolls Containing the Names of all Persons Possessed of Existing Property Rights Under the Treaties.

(*a*) The commission having reported (H. R. Rep., No. 593, 55th Cong., 2nd Ses.), that additional legislation was necessary in order to enable it to make correct rolls of the respective tribes, and "to do equal justice to all concerned," the act approved June 28, 1898 (sec. 21, 30 Stat. L., 502), was passed. By this act the commission was directed to make *correct* "rolls of citizenship" and "rolls of freedmen" which should contain the names of all of the legal beneficiaries entitled to share in the property under the respective treaties with each of said tribes, and was expressly directed to enroll all persons who were of *Indian blood*. The act further provided that no provision of the act should be so construed as to deprive any person of any *vested legal rights*, nor be so construed as to confer any *additional rights* upon any

person whomsoever, and that when the rolls were "so made" and approved by the Secretary they should be final (Rec., pp. 4, 5, Par. XI).

(b) *Supplemental Agreement of July 1, 1902.*

By an agreement ratified by Congress, July 1, 1902 (sec. 27, 32 Stat. L., 641, 5), but which in fact was merely a law of Congress, it was provided that the "Citizenship and Freedmen rolls" of the Choctaws and Chickasaws should be made by the commission in strict compliance with the act approved June 28, 1898 (31 Stat. L., 495).

10. Instructions of the Department to the Commission Thereunder.

(*a*) On March 17, 1899, Judge Willis J. Van Devanter, then Assistant Attorney-General for the Department of the Interior, now United States Circuit Judge for the Eighth Circuit, construing the act of June 28, 1898, rendered an opinion, which was approved by the Secretary, for the guidance of the commission and the Secretary in the preparation of the rolls thereunder (S. Rep., 5013, part 3, 59th Cong., 2d Ses., p. 1551, 5), in which he advised the commission and the Secretary that:

> "The act of 1897 did not provide for new applications for citizenship. . . . Neither did the act of 1898 make any provision for new applications for citizenship. The commission was authorized and directed to enroll the persons indicated, and to investigate the right of all other persons whose names were found upon *any* tribal roll, and to omit all such as may have been placed there by fraud or without authority of law. They were not authorized to add any name not found upon *some* roll of the tribe, except those of

> *descendants* of persons rightfully upon *some* roll. . . . The rolls *so made* by the commission are to be final when approved by the Secretary of the Interior" (Rec., p. 10, Par. XIII).

(*b*) On July 25, 1899, Commissioner of Indian Affairs W. A. Jones officially instructed the commission with reference to the examination of claimants and particularly with reference to the record in each case (S. Rep., 5013, part 2, 59th Cong., 2d Ses., 1558) as follows:

> "For the purpose of this record you will require each applicant for enrollment to present himself in person before the commission at one of its appointments within the tribe in which such applicant claims right to enrollment for examination *under oath*, his statements to be *taken down* by the commission, upon which the commission will determine his right to enrollment, and such *record* and action of the commission will be preserved and *transmitted* with the rolls to be considered by this office and the Department when the rolls made by the commission are submitted for the approval of the Secretary of the Interior" (Rec., p. 10, Par. XIII).

11. Action of the Commission and Secretary Thereunder, Resulting in the Exclusion of Appellants.

(*a*) The commission, when it came to make up the rolls under the act of June 28, 1898 (30 Stat., 495), erroneously construed the grant of 1842, made to the Choctaws and Chickasaws in pursuance with article 2 of the treaty of September 27, 1830, as an absolute unconditional grant to the *nations*, with no *individual* rights therein (Rec., p. 10, Par. XIII), and construed the acts of Congress as *granting* rights in the *national* property only to such persons as the *then* tribal officials recognized as *then* entitled to the political right of "citizen-

ship" in the Choctaw and Chickasaw nations under the tribal laws, usages, and customs (Rec., p. 9, Par. XIII).

(*b*) *Only* such *persons* as the then tribal officials *denied* were entitled to *enrollment* were examined by the commission, and *only* such memorandum of their statements as the commission saw fit to record on a card used for that purpose, was *"taken down,"* contrary to the instructions of the Commissioner of Indian Affairs (S. R. 5013, part 2, 59th Cong., 2d Ses., 1559; Rec., p. 11, Par. XIII).

(*c*) The commission held, when it came to make up the *final* rolls from these incomplete and in many cases *silent* records, that no person could be enrolled unless:

First. The claimant had, when before the commission for examination, made an *application* for enrollment as a *"citizen,"* as shown by the memorandum made by the commission (Rec., p. 11, Par. XII).

Second. The claimants' right was *recognized* by the then tribal *officials* or his name appeared on some one of a half dozen incomplete rolls, or parts of rolls made up by the Indian officials between the years 1885 and 1896 (Rec., p. 9, Par. XIII).

Third. The claimant was on June 28, 1898, actually residing in the nations (Rec., p. 9, Par. XIII).

(*d*) Each of these requirements was without authority of law, contrary to the statute and the instructions of the department (Rec., pp. 9, 10, Par. XIII).

(*e*) The names of all of appellants, or the names of their immediate ancestors, rightfully appear on the official rolls of the tribes, numbering more than 80 rolls, which were prepared between 1830 and 1860 by government officers and approved by the chiefs or governors of the tribes, and upon which distribution of lands, landscrip, rations, implements, and funds had been made, and, which have at all times since their preparation been

in the custody of the departmental officers at Washington and are now in the office of the auditor for the Department and the Secretary's office. But the commission, contrary to the law and the instructions of Judge Van Devanter, then Assistant Attorney-General, arbitrarily refused to examine or consider these rolls in determining appellants' rights, and used *only* the incomplete, fraudulent and spurious rolls furnished it by the Indian officials and those pecuniarily interested in the division of the property and arbitrarily excluded appellants (Rec., p. 10, Par. XIII).

(*f*) A majority of complainants actually resided in the nations on the 28th day of June, 1898, and the names of many of them, or their immediate ancestors, appeared on some of the half dozen tribal rolls or parts of rolls used by the commission, and the records show that when they appeared before the commission they demanded that they be enrolled as citizens by blood of the nations, but these evidences of their rights under the arbitrary rules fixed by the commission were disregarded and they were nevertheless denied by the commission through the instrumentality of one of its officers, William O. Beall, who was in charge of the Choctaw and Chickasaw enrollment division of the commission and later its secretary. This officer during the month of June, 1903, secured a leave of absence from the commission and went into the office of Mansfield, McMurray & Cornish attorneys for the nations, and there for a money consideration, prepared and briefed cases in which many of the names of appellants appeared, against the claimants and in favor of the nations. Later he returned to the commission and there in its name passed upon and determined the claims of appellants in each case adversely to them. In order that these decisions, thus fraudulently prepared might not be reversed by the secretary, parts of the records in the cases of appellants were suppressed and held in the

office of the commission and were not transmitted with the decision of the commission to the Secretary of the Interior for final approval. In other cases parts of the records were taken from the files of the commission and have never been returned (Rec., pp. 11, 12, Par. XIII).

(*g*) Neither appellants nor their attorneys were permitted to inspect the records in their cases and at hearings had thereon before the commission the officers refused to receive and make a part of the record or to permit the stenographer to incorporate in the record statements of the existence of documentary evidence conclusively showing their rights. Neither Secretary Beall nor Commissioner Bixby were lawyers; but nevertheless all decisions in the cases of appellants were prepared under the direction of Beall and pro forma approved by Bixby (Rec., p. 12, Par. XIII).

(*h*) In order to defeat the rights of many of appellants there was used and followed as a precedent a decision in a Cherokee case which was written by a man only a few days before he was incarcerated in St. Elizabeth's Insane Asylum, and who thereafter died in the asylum, and which decision was pro forma affirmed by the Commissioner of Indian Affairs and the Secretary of the Interior. This decision was not applicable to the rights of appellants, but pertained to the rights of citizens of the Cherokee Nation where different laws governed the determination of such rights. Notwithstanding these facts were known to the commission, this decision was strictly adhered to, in order to deprive appellants of their rights (Rec., p. 12, Par. XIII).

(*i*) Many of these fraudulent decisions of the Commission were held in its office at Muskogee, Oklahoma, until the jurisdiction of the Secretary to act on these cases was about to expire, and then they were forwarded to the Department. During the week preceding March 4, 1907, on which day the jurisdiction of the Secretary of

the Interior ceased and terminated he passed upon and determined 2,023 cases involving the rights of upwards of ten thousand claimants, which cases included the claims of many of appellants, and on account of the limited time in which he had to act he did not give them due consideration or any consideration whatsoever (Rec., p. 12, Par. XIII).

(*j*) Some of appellants were found by the Commission and the Secretary to be citizens of the nation, but owing to an alleged lack of time to write their names on the rolls before "final approval" by the Secretary they were not enrolled (Rec., p. 11, Par. XIII).

(*k*) About 8,000 negroes, who had no rights in the property, were enrolled as Choctaw or Chickasaw "freedmen," by the commission erroneously construing article 3, of the treaty of 1866 (14 Stat. L., 769), and section 21 of the act of June 28, 1898 (30 Stat. L., 504), to entitle *all* persons of African blood and descent who had at any time been held by the Choctaws or Chickasaws as slaves, and their descendants born prior to July 1, 1902, to enrollment as "freedmen" (Rec., p. 11, Par., XIII).

(*l*) About 2,220 intermarried white persons were erroneously enrolled as "citizens" of the tribes when they had no lawful right to such enrollment or to share in the property (Rec., p. 13, Par., XV).

(*m*) Some of appellants were actual members of the Choctaw Nation in 1830 or of the Chickasaw Nation in 1837 when the treaties were entered into by which the property in controversy was secured. All the remainder of them are descendants of such members. These facts were, however, considered by the commission and the Secretary as having no bearing upon their rights to share in the property (Rec., p. 9, Par., XIII).

(*n*) The rolls as thus erroneously and fraudulently made up were, on March 4, 1907, approved by Secretary

Hitchcock and *only* those persons whose names appear thereon are recognized by the Secretary as having any rights in the property (Rec., p. 12, Par. XIII).

12. Legislation Providing for the Division of the Property and Action of the Commission Thereunder.

(*a*) By act of June 28, 1898 (30 Stat. L., 505), commonly known as the Atoka agreement, it was provided—

> "that all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands:"

and, further that each member, including the freedmen entitled to share in the property, should—

> "where it is possible, have the right to take his allotment on lands, the improvements on which belong to him, and such improvments shall not be estimated in the value of his allotment . . . and due care taken that *all* persons entitled thereto have *allotments* made to them" (Rec., p. 5, Par. X).

(*b*) By act of July 1, 1902 (sec. 11, 32 Stat., 642), commonly known as the supplemental agreement with the Choctaws and Chickasaws, it was further provided that there should be alloted to each member of the tribes, 320 acres of the average allottable lands, and to each freedman 40 acres to be selected by the allottee so as to include his improvements (Rec., p. 5, Par. X). By section 28 it was provided that the names of all persons living upon the final ratification of "this agreement" entitled to be enrolled under the act of June 28, 1898 (30 Stat. L., 495), "shall be placed upon the rolls made by the commission; and no child born thereafter to a citizen

or freedman and no person intermarried thereafter to a citizen shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws (Rec., p. 5, Par. X).

(*c*) In addition to the 320 acres of the average allottable land to be allotted to each enrolled member of the tribes he was to receive $75.00 in case from moneys derived from the sale of townsite property (Rec., p. 5, Par. X).

(*d*) By the act approved April 26, 1906 (secs. 16, 17, 34 Stat. L., 143), it was provided—

> "that when allotments as provided by this and *other acts* of Congress have been made to all members and freedmen of the Choctaw and Chickasaw . . . tribes,"

the residue of the property should be sold and the proceeds derived therefrom—

> "distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes. . . ."

(*e*) Neither the act of June 28, 1898 (30 Stat., 505), nor that of July 1, 1902 (32 Stat., 641), commonly referred to as agreements, was ever ratified by a majority of the legal beneficiaries in this trust estate. Only such adult males as the tribal officials recognized as members of the tribes, were permitted to participate in the elections at which these pretended agreements are claimed to have been ratified and several thousand persons who had been adopted or intermarried into the tribes were permitted to vote, while appellants, who were blood Indians, were excluded.

It was through their votes that these agreements were ratified, while appellants were denied the right to vote at these elections, whereas the only persons who could

have legally ratified these agreements were members of the designated class of persons entitled to share in the property under the treaties and the grant. Neither of the agreements was ever ratified by a majority of said designated class, and every person, both adult and minor, who was entitled to share in the property under the treaties and the grant was entitled to participate in the elections either in person or by representative and since this did not occur these agreements were mere acts of Congress and are null and void (Rec., p. 6, Par. XI), according to the decision in Red Bird *vs.* U. S., 203 U. S., 76, 94, 51 L. Ed., 96, 104.

13. Distribution Being Made and Sought to be Enjoined.

(*a*) The Secretary, besides excluding appellants, is causing 320 acres of land to be allotted to each person whose name appears on the citizenship rolls as finally approved by him, which includes, without right, many persons who are not Choctaw or Chickasaw Indians, but who are listed on the rolls as such, as well as 2,220 intermarried white persons, and paying to each of them in cash $75 out of the proceeds derived from the sale of townsite property, and is causing 40 acres of land to be allotted to each person enrolled as a freedman, including 12,313 persons who have no right to be upon the freedmen rolls or to share in the property (Rec., p. 13, Par. XV).

(*b*) Lands which have for many years been in possession of appellants, and upon which they are now living and have made valuable and lasting improvements, and are not in excess of their lawful share of the property, have been allotted to persons whose names appear on the citizenship and freedmen rolls, and the Secretary is now issuing or causing to be issued patents to the allottees purporting to pass to each one a good and valid title, and

is forcibly ejecting and dispossessing appellants from their homes (Rec., p. 15, Par. XIX).

(*c*) The secretary is without authority of law, permitting those persons enrolled as freedmen who selected the more valuable land, to purchase, at a fictitious valuation, sufficient additional land to make up allotments of 40 acres each, and is issuing patents to said freedmen therefor (Rec., p. 15, Par. XX).

(*d*) After the fourth of March, 1907, the Secretary arbitrarily and without notice struck from the approved citizens ip rolls the names of about 1,700 intermarried white persons who had no lawful right to share in the property. The persons whose names were thus stricken from the rolls entered into contracts with certain attorneys by which they agreed to pay the attorneys a percentage of the property recovered in the event the attorneys were successful in securing the reinstatement of their names on the rolls and the recovery of their property rights. Suits were instituted in the Supreme Court of the District of Columbia to compel the Secretary to reinstate the names so stricken, on the rolls, and some of them have been decided favorable to the claimants on the ground that they were stricken without notice (29 Sup. Ct. Rep., 62, 66), and the secretary is under an act of Congress (35 Stat., 90) which is unconstitutional, null and void approving these contracts and attempting to make them a lien on the common lands and funds, and is allotting lands to each such person (Rec., pp. 14, 15, Par. XVIII).

(*e*) The Secretary will, immediately upon the completion of allotments to persons whose names appear on the rolls, sell and dispose of all the unallotted property and distribute all the funds derived therefrom among them to the exclusion of appellants (Rec., pp. 15, 16, Par. XXI).

(*f*) The Secretary has paid $750,000 to the firm of Mansfield, McMurray & Cornish, attorneys for the na-

tions, which was secured as a result of the bribery of the so-called Choctaw-Chickasaw Citizenship Court, which amount it is sought to recover back from the parties who received it, as well as other funds which have been illegally paid out by the Secretary and the officials of the two nations (Rec., pp. 16, 17, Par. XXII, XXIII).

(*g*) One million three hundred and eighty-six thousand seven hundred and twenty acres of the common lands have by the Secretary, without authority of law, been withdrawn from allotments, establishing therein a game preserve or forest reserve (Rec., p. 17, Par. XXV).

(*h*) The Secretary has reserved from the lands as a national reserve, a large tract near Sulphur in the Chickasaw Nation, upon which are located valuable mineral springs. This was done under an alleged agreement with the Government, approved by a vote of a majority of those adult citizens of the nations exercising *political rights*, and is to pay therefor $20.00 per acre, which sum is far less than the value of the property, the proceeds of which are to be divided among appellees whose names appear upon the citizenship rolls to the exclusion of appellants (Rec., pp. 17, 18, Par. XXVI).

(*i*) The Secretary has caused large tracts of land to be given and conveyed to schools and public institutions, without compensation therefor (Rec., p. 18, Par. XVII).

(*j*) The Secretary has reserved from allotment 437,734 acres of coal land, and a large area containing asphaltum deposits, from which he is annually receiving large revenues and is distributing same among appellees to the exclusion of appellants (Rec., pp. 18, 19, Par. XXVIII, XXIX).

(*k*) Appellees McCurtain (Chief of the Choctaws), and D. H. Johnston, (Governor of the Chickasaws) have, upon behalf of their nations, entered into a contract with Mansfield, McMurray & Cornish to sell for a commission of 10 per cent the coal lands for $10,000,000,

which sum is far less than their value, the net proceeds to be deposited in the United States subtreasury for the exclusive benefit of those upon the citizenship rolls (id. 19, Par. XXX).

14. Prayer.

The relief sought is:

(*a*) An injunction against the Secretary making further allotments or distribution other than upon and in accordance with a final determination of the rights of complainants, and an accounting for all property received, held, or disposed of (Rec., pp. 20, 21, par. f. g.); an injunction against McCurtain and Johnston, respectively, principal chief and governor of their respective nations, from disposing of or contracting for the disposition of any of the property in controversy, and for an accounting as to all dispositions heretofore made of any part thereof (id. 21, par. h); a like injunction against Mansfield, McMurray & Cornish, and an accounting for that which they have received, including the $750,000 (id. 21, par. i.; Rec., p. 23, par. p.); and an injunction against each person named on the citizenship and freedmen rolls from disposing of any property received by them (id. 21, par. j.)

(*b*) An ascertainment of the right, title, and interest of each of appellants in and to the property, and such orders in reference to and for the distribution thereof as should in equity be made.

Points and Authorities.

1. Appellants were in 1830 and 1837 either blood members of the Choctaw or Chickasaw Indian tribes or nations, respectively, or are the descendants of such members, and the great majority of them have affiliated with the tribes and lived on the common lands occupied by said tribes since their birth. Either their names or the names of their immediate ancestors appear on the offi-

cial rolls of the tribes as blood members thereof. This suit was brought to establish their right in and to the property of the Choctaws and Chickasaws, which was, and is now, being distributed under the supervision of the Interior Department by virtue of recent acts of Congress (July 10, 1896, 29 Stat., 339, 340; June 28, 1898 30 Stat., 495; July 1, 1902, 32 Stat., 641). Appellants claim:

(*a*) That by the patent issued by the President of the United States under date of March 23, 1842, pursuant to article 2, of the treaty of September 27, 1830 (7 Stat., 333), the legal title to all the property in controversy was conveyed to the Choctaw Nation in trust for the exclusive use and benefit of a *designated class of people* comprising all those persons who were members of the Choctaw Tribe of Indians on the date the treaty of September 27, 1830 (7 Stat., 333), was ratified and their descendants, and all those persons who were members of the Chickasaw community on the day the treaty of January 17, 1837 (11 Stat., 573), was ratified and their descendants, and that upon the dissolution of the nation the legal title merged with the equitable title and the designated class became the absolute owners of the property as tenants in common (Argument Div. 2).

(*b*) That even if appellant's rights were not so vested under the treaties and they had no higher rights at the time of dissolution than membership or citizenship in the tribe, as shown by the official tribal rolls, which the law directed the administrative officers to respect and follow, they had such an interest in the tribal property secured under the laws of Congress that a court would prevent administrative officers of the Government from ignoring them, especially when such action was the result of fraud, bribery, and misconception of official duty (Argument Divs., 8, 11).

2. Under section 18 of the treaty of September 27,

1830 (7 Stat. L., 332), and rules of law (U. S. *vs.* Choctaw Nation, 179 U. S., 494, 45 L. Ed., 291, 306), appellants are entitled to have the language of the treaty construed most favorably to them as Indians, and, therefore, in favor of vested individual interests. The language upon which their claim is based is stronger than that heretofore construed as vesting an interest.

New York Indians *vs.* U. S., 170 U. S., 1, 15, 42 L. Ed., 927, 932.

U. S. *vs.* New York Indians, 173 U. S., 454, 471, 43 L. Ed., 769, 772.

New York Indians *vs.* U. S., 40 Ct. Cl., 448.

Jones *vs.* Meehan, 175 U. S., 1, 12, 44 L. Ed., 45, 54.

Shultis *vs.* McDougall, 170 Fed. Rep., 529, 533, 535.

Wallace *vs.* Adams, 74 C. C. A., 540, 143 Fed. Rep., 716, 722, 723.

These cases are precisely in point upon this proposition, so that the language of the treaties alone should be construed as vesting an interest (Argument, Div., 4).

3. If, however, there were any doubt as to the proper construction of said treaty, then negotiations for the treaties, subsequent legislation, and the history of the times, clearly show that the purpose and intent of the Government was to vest an individual interest (Argument, Div. 4). According to the general rules of law, the language in the treaties and patent indicate an intention to convey the property in fee simple to the nation for its then members and their descendants, thus clearly creating a trust.

Randolph *vs.* East Birmingham Lamp Co., 104 Ala., 355, 16 So. Rep., 126.

Commrs. *vs.* Walker, 6 How. Miss., 143, 38 Am. Dec., 435.

Estate of Smith, 144 Pa. St., 428, 22 Atl. Rep., 916.

Salem Capital Flour Mills Co. *vs.* Staten, etc., Co., 33 Fed. Rep., 146, 153.

Hermans *vs.* Schmaltz, 7 Fed. Rep., 566, 573, 574. (Argument, Div. 4).

Use of the words "there be and is hereby granted" conclusively shows a purpose to vest a personal title.

Leavenworth, etc., R. Co. *vs.* U. S., 92 U. S, 733, 23 L. Ed., 637.

Missouri, etc., R. Co. *vs.* K. P. R. Co., 97 U. S., 491, 24 L. Ed., 1097.

St. Joseph, etc., R. Co. *vs.* Baldwin, 103 U. S., 427, 26 L. Ed., 579.

New York Indians *vs.* U. S., 170 U. S., 17, 42 L. Ed., 927, 933.

(Argument, Div. 4.)

The word "descendants" has a well defined legal meaning, different from heirs, successors, citizens, or residents. It means one who descends as an offspring, however remotely. 13 Cyc., 1047, 1049; 9 A. & E. Enc. L., 2d Ed., 399; 1 Bouvier's Law Dict. Ralls Div., 550; 1 Black's Daw Dict., 359; Ralph *vs.* Carrick, 11 Ch. Div., 873; Van Buren *vs.* Dash, 30 N. Y., 393, 418, 422; Bates *vs.* Gillett, 132 Ill., 287, 297, 24 N. E. Rep., 611, 612; Hillen *vs.* Iselin, 144 N. Y., 365, 374, 39 N. E. Rep., 368, 371; Tichenor *vs.* Brewer, 98 Ky., 349,352,33 S. W. Rep., 86, 87; Waldron *vs.* Taylor, 52 W. Va., 284, 289, 45 S. E. Rep., 336, 338, 339; Levering *vs.* Orrick, 97 Md., 139, 54 Atl. Rep., 620, 622, 633. Therefore who ever was a descendant of a member was within the spirit of the conveyance (Argument, Div. 4).

4. If an interest was vested by t he treaties and the patent, then it was such as fell within the protection of

the constitution, for an Indian title or intertest so vested can not be taken without due process of law. Worcester *vs.* Georgia, 6 Pet., 515, 559, 560, 8 L. Ed., 483, 500, 501; Edye *vs.* Robertson, 112 U. S., 598, 599, 28 L. Ed., 803, 804; Downs *vs.* Bidwell, 182 U. S., 244, 271, 45 L. Ed., 1089, 1100; Kansas Indians, 5 Wall., 737, 755, 756, 18 L. Ed., 667, 672; Doe *vs.* Wilson, 23 How., 457, 16 L. Ed., 584, 586; Chae Chan Ping *vs.* U. S., 130 U. S., 581, 32 L. Ed., 1068, 1077. (Argument, Div. 2). Due process of law means the right to hold property free from legislative judgment or decree and subject only to be divested by a judicial tribunal after a hearing. Hurtado *vs.* California, 110 U. S., 516, 558, 28 L. Ed., 232, 238. (Argument, Div. 2). So the provision made for the distribution of the Indian property was legislative power conferred upon administrative bodies, and was in no sense judicial (Wallace *vs.* Adams, 74 C. C. A., 540, 143 Fed. Rep., 716, 725), and could not have been (Garfield *vs.* U. S., 211 U. S., 249, 262, 29 Sup. Ct. Rep., 62, 66), and hence in no wise did or could deprive the courts of determining whether there was a vested interest.

Jones *vs.* Meehan, 175 U. S., 1, 32, 44 L. Ed., 49, 62.

Garfield *vs.* U. S., 211 U. S., 249, 262, 29 Sup. Ct. Rep., 62, 66.

New York Indians *vs.* U. S., 40 Ct. Cl., 448.

(Argument, Div. 2).

5. A treaty was in 1855 (11 Stat. L., 611), made with the Choctaws and Chickasaws, confirming their titles "to the members . . . their heirs and successors." In view of the negotiations leading up to the original treaty the words "heirs and successors" were used in the sense of descendant. 13 Cyc., 1049, 15 A. & E. Enc. L., 2d Ed., 318, 319; 27 id., 360. But if an estate vested under the previous treaties in the descendants, it could

not be carved down to heirs and successors by this treaty. There is nothing in the treaty indicating that the title was to be vested in the nation without regard to individual rights of the members, but on the contrary a distinct recognition of individual rights appears (Argument, Div. 7).

6. A treaty was in 1866 (14 Stat. L., 769) adopted, for a specific purpose, but which also contemplated the extinction of the two tribal governments and the creation of one general government, which object was never effectuated. This treaty did not purport to change the vested rights already in existence, and could not have done so (Argument, Div. 7).

7. The act of June 28, 1898 (30 Stat. L., 495), provided for the ascertainment by a legislative commission of existing rights under the treaties with the Choctaws and Chickasaws and the placing of the names of all persons found to possess such rights on rolls to be prepared and used as a basis for distributing the property. This act, under which the rolls now being used by the Department as a basis of distribution were prepared, not only recognized those persons possessed of treaty rights, as the only persons entitled to share in the property, but (section 11) expressly provided that nothing therein contained should be so construed as to affect any vested legal rights nor as conferring any additional rights in the property. The commission authorized to ascertain existing treaty rights was legislative in its nature and could not construe the treaty rights of claimants in this property (Jones *vs.* Meehan, 175 U. S., 1, 32, 44 L. Ed., 49, 62), and no finding or decision of such a commission could deprive appellants of their property or preclude a court from inquiring into and determining their rights (Argument, Div. 8).

8. If an interest was vested in appellants by the treaty of 1830 or by the statute, they were entitled to enforce

the same in the courts of the land, as was determined in Garfield *vs.* U. S., 211, U. S., 249, 29 Sup. Ct. Rep., 62, 66. If the names of the appellants or their ancestors appeared on any tribal roll, then, by virtue of the act (30 Stat., 495), they could not be arbitrarily ignored by the administrative officers and thus deprived of their property. Such rights are enforcible in the courts.

Marbury *vs.* Madison, 1 Cranch, 152, 170, 2 L. Ed., 71.

R. R. Co. *vs.* R. R. Com'rs, 161 Fed. Rep., 959.

Cunningham *vs.* Ashley, 14 How., 377, 388, 14 L. Ed., 462, 467.

(Argument, Div. 11).

9. Appellants rights are in no sense political (Argument, Div. 9).

APPELLANTS' ARGUMENT.

1. The Appeal.

(*a*) This appeal is taken direct to this court under section 5 of the act approved March 3, 1891 (26 Stat., 827), which provides:

> "That appeals . . . may be taken from the . . . circuit courts direct to the Supreme Court in the following cases:
>
> "In any case in which the *jurisdiction* of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
>
> "In any case that involves the construction or *application* of the Constitution of the United States.
>
> "In any case in which the constitutionality of

> any law of the United States, or the validity or *construction* of any *treaty* made under its authority, is drawn in question."

Questions here presented are the *jurisdiction* of the trial court based upon the *application* of the Constitution of the United States to the rights claimed, the *construction* of various treaties and laws of Congress, and the *constitutionality* of certain laws of Congress and certain agreements with the Choctaws and Chickasaws.

(*b*) Rights in the property in controversy never having been finally construed by a court, Congress included in the bill, approved March 3, 1909, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and ten," the following provision:

> "That the Attorney-General of the United States is hereby authorized and directed to immediately move the advancement upon the docket of the Supreme Court of the United States of the case of J. E. Fleming and others against Green McCurtain and others, docket numbered five hundred and thirty-five, to the earliest practicable hearing."

2. Origin of Appellants' Title, Treaties of September 27, 1830 (7 Stat., 333), and January 17, 1837 (11 Stat., 573), and the Patent of March 23, 1842.

(*a*) The origin of appellants' rights, either as *members* or as *descendants* of former members of the Choctaw and Chickasaw nations or tribes, is found in the treaty of Dancing Rabbit Creek of September 27, 1830 (7 Stat., 333), by article 2 of which it was provided:

> "The United States, under a grant specially to be made by the President of the U. S., shall cause

> to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it. . . ."

The circumstances and conditions surrounding the contracting parties at the time this treaty was negotiated and their intention and object in entering into it, their understanding of its provisions, immediately and for many years after its ratification, will be hereafter reviewed at length for the purpose of showing that both of the contracting parties had at all times in mind the passing of a fee simple title and the *vesting* of *individual* rights in "them and their descendants."

(*b*) Before consummation of the action contemplated under the treaty of September 27, 1830, the Choctaws, at the urgent solicitation of the United States, and for valuable consideration, conferred upon the Chickasaws by the treaty of January 17, 1837 (11 Stat., 573), equal individual rights with the Choctaws in the property to be conveyed under article 2, of the treaty of September 27, 1830, so that the Choctaws and Chickasaws and their descendants, as members of an amalgamated tribe, constituting a designated class of people, became beneficiaries with equal individual rights therein.

(*c*) President Tyler, on March 23, 1842, pursuant to article 2, of the treaty of September 27, 1830, caused to be issued a patent (Rec., vol. 1, p. 43, Gen. Land Office) reading:

> "*The United States of America, to all to whom these presents shall come, Greeting*:
>
> "WHEREAS, by the second article of the treaty began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States, on the 24th day of February, 1831), by the commissioners on the part of the United States and the

Mingoes, chiefs, captains, and warriors of the Choctaw Nation, on the part of said nation, it is provided that 'The United States under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it: Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits, thence due south to Red River, and down Red River to the west boundary of the territory of Arkansas, thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825.'

"Now, Know Ye, That the United States of America in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant unto the said Choctaw Nation, the aforesaid 'tract of country west of the Mississippi,' to have and to hold the same, with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, as intended to be conveyed by the aforesaid article 'in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it,' liable to no transfer or alienation except to the United States or with their consent."

As the patent was issued pursuant to article 2 of the treaty of September 27, 1830, which provided for a conveyance "in fee simple to them and their descendants" the limitation (if it could be said to be such) inserted in the last lines of the patent by the administrative officers, "liable to no transfer or alienation except to the United States or with their consent," was void. So the law was

declared in Holden *vs.* Joy, 17 Wall., 211, 21 L. Ed., 523, 536, where Mr. Justice Clifford said:

> "Strong doubts are entertained whether that condition in the patent is valid, as it was not authorized by the treaty under which it was issued. By the treaty the United States covenanted and agreed to convey the lands in fee simple title, and it may well be held that if that condition reduced the estate conveyed to less than a fee, it is void."

(*d*) Under the treaties of September 27, 1830 (7 Stat., 333), and January 17, 1837 (11 Stat., 573), and the patent of March 23, 1842, appellants claim that the *legal title* to the property in controversy was conveyed to the Choctaw Nation, or tribe, in *trust* for the exclusive common use and benefit of the *equitable* owners, comprising *a designated class of people*—i. e., those persons who were *members* of the Choctaw community on the day the treaty of September 27, 1830, was ratified and their *descendants* and the *members* of the Chickasaw Nation or tribe on the day the treaty of January 17, 1837, was ratified and their *descendants*. The trust was to continue so long as the designated class of persons maintained a national or tribal government and the lands were used as a common home for all, but upon the happening of either of these contingencies the *trust* ceased, the legal title merged with the equitable title and the designated class became the absolute owners as tenants in common.

3. Property Rights Acquired by Appellants Under Treaties Are and Have at All Times Been Protected by the Constitution.

(*a*) If the treaties of 1830 and 1837 and the patent of 1842 issued thereunder vested rights in appellants as members of a designated class, the Fifth Amendment to the Constitution protected them from invasion.

In Worcester *vs.* Georgia, 6 Pet., 515, 559, 560, 8 L. Ed., 483, 500, 501, Mr. Chief Justice Marshall said:

> "The Constitution, by declaring treaties already made as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, heaving each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense."

In Edye *vs.* Robertson, 112 U. S., 598, 599, 28 L. Ed., 803, 804, Mr. Justice Miller said:

> "But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . The Constitution of the United States places such provisions as these in the same category as the other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land.' A treaty then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And, when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

(b) *Constitution Expressly Extended Over Property in Controversy.*

The act of March 2, 1890 (26 Stat., 96), provided:

> "The Constitution of the United States . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States."

This is probably immaterial, for if any rights *rested* in appellants' under the treaties and the grant those rights have at all times been entitled to full constitutional protection and neither the Indian governments nor the Congress could enact any law that could impair them. However, in Downs *vs.* Bidwell, 182 U. S., 244, 271, 45 L. Ed., 1088, 1100, Mr. Justice Brown, after a review of the authorities, as a proposition which should "be considered as established," stated this:

> "That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith."

So it must at least be said to be settled that any personal vested right of complainants existing on March 2, 1890, by virtue of the act of that date, fell within the protection of the Constitution, so that Congress could not thereafter make any provision for interference therewith or distribution thereof except in accordance with the constitutional requirement, and since neither the Dawes Commission nor the Citizenship Court was then created, manifestly the protection of the Constitution can be claimed against their acts.

(c) *Grants Made to Indians or Classes of Indians Come Within Constitutional Protection.*

That an absolute title may be conferred upon an Indian, or class of Indians, by a treaty which is entitled to and given protection, has been repeatedly decided,

notably in New York Indians *vs.* United States, 170 U. S., 1, 15, 42 L. Ed., 927, 932, and cases therein cited; U. S. *vs.* New York Indians, 173 U. S., 454, 471, 43 L. Ed., 769, 772; New York Indians *vs.* U. S., 40 Ct. Claims, 448; Jones *vs.* Meehan, 175 U. S., 1, 12, 44 L. Ed., 49, 54, and Shulthis *vs.* McDougal, 170 Fed. Rep., 529, 533, 535. Quotations from the opinions in these cases are hereafter made.

In Wallace *vs.* Adams, 74 C. C. A., 540, 143 Fed Rep., 716, 722, 723, Judge Sanborn said that the opinions in—

> ". . . Rutherford *vs.* Greene's Heirs, 2 Wheat., 196, 4 L. Ed., 218; Gaines *vs.* Nicholson, 9 How., 356, 13 L. Ed., 172; U. S. *vs.* Brooks, 10 How., 442, 13 L. Ed., 489; Doe *vs.* Wilson, 23 How., 457, 17 L. Ed., 584; Crews *vs.* Burcham, 1 Black, 352, 17 L. Ed., 91; Best *vs.* Polk, 18 Wall., 112, 21 L. Ed., 805; New York Indians *vs.* U. S., 170 U. S., 1, 18 Sup. Ct., 531, 42 L. Ed., 927; Jones *vs.* Meehan, 175 U. S., 1, 20 Sup. Ct., 1, 44 L. Ed., 49, . . . are limited to rulings that grants to designated persons or classes of persons are grants in præsenti, and that after they have taken effect the rights to the property have vested so that they may not be lawfully destroyed by legislation without compensation."

In the Kansas Indians, 5 Wall., 737, 755, 756, 18 L. Ed., 667, 672, Mr. Justice Davis observed of the Indians:

> "If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress."

It therefore necessarily follows that an absolute grant could have been made to the Choctaws and Chickasaws as a designated class of persons, which could not be impaired by any Congressional legislation, and under the doctrine of the foregoing an interest was undoubtedly vested.

(d) *Property Rights Distinguished from Political Rights.*

That a *political* right dependent upon the continuation of the treaty for its existence, may be terminated by the abrogation of the treaty, may be conceded. But the repeal of a treaty under which *property* has been secured can not affect the title to the property.

So in Chae Chan Ping *vs.* U. S., 130 U. S., 581, 32 L. Ed., 1068, 1077, Mr. Justice Field thus made plain the distinction between vested and political treaty rights:

> "The rights and interests created by a treaty which have become so vested that its expiration or abrogation will not destroy or impair them are such as are connected with and lie in property capable of sale and transfer or other disposition not such as are personal and untransferable in their character. Thus in the Head-Money cases the court speaks of certain rights being in some instances conferred upon citizens or subjects of one nation residing in the territorial limits of the other, which 'are capable of enforcement as between private parties in the courts of the country.' 'An illustration of this character,' it adds 'is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance when the individuals concerned are aliens.' 112 U. S., 580, 598, 628, 798, 803. The passage cited by counsel from the language of Mr. Justice Washington in Society For the Propagation of the Gospel *vs.* New Haven, 21 U. S., 8 Wheat., 464, 493 (5:662), also illustrates this doctrine. There the learned Justice observes that 'if real estate be purchased or secured under a treaty it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth it no more affects such rights than the repeal of a municipal law affects rights acquired under it.' Of this doctrine there can be no question in this court. But far different is this case, where a con-

tinued suspension of the exercise of a Governmental power is insisted upon as a right, because by the favor and consent of the Government it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. **Between property rights not affected by the termination or abrogation of a treaty and expectations of benefits from the continuance of existing legislation there is as wide a difference as between realization and hopes.**"

(e) *Vested Property Rights Can Only be Disturbed by Due Process of Law.*

The fifth amendment to the Constitution provides:

> "No person shall be . . . deprived of life, liberty or property without due process of law."

(1) What is property?

In Doe *vs.* Wilson, 23 How., 457, 16 L. Ed., 584, 586, Mr. Justice Catron said:

> "The Indian title is property, and alienable, unless the treaty had prohibited its sale. Cornet *vs.* Winton, 2 Yerg., 148; Blair and Johnson *vs.* Pathkiller, 2 Yerg., 414."

This language was quoted with approval by Mr. Justice Gray in Jones *vs.* Meehan, 175 U. S., 1, 16, 44 L. Ed., 49, 56. Indeed such has been the uniform holding of this court with reference to grants made to an individual Indian or to a class of Indians, and no distinction has ever been drawn between such grants and similar grants to any other class of people.

(2) What is due process of law?

Due process of law has been often defined. One decision is peculiarly applicable. In Hurtado *vs.* California (110 U. S., 516, 558, 28 L. Ed., 232, 238), Mr. Justice Matthews said:

> "Law is something more than mere will exerted as an act of power. It must be not a special rule

> for a particular person or a particular case, but in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transferring one man's estate to another, *legislative judgments and decrees, and* other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power enforcing its edicts to the injury of the persons and property of its subjects is not law, whether manifested as the decree of a personal monarch or of any impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of government."

All the findings and judgments of the Dawes Commission, the Citizenship Court, the United States District Court, and the action of the Secretary of the Interior were purely legislative in their nature. Thus, in Wallace *vs.* Adams, 74 C. C. A., 540, 143 Fed. Rep., 716, 725, Judge Sanborn said:

> "In the rendition of those judgments, however, those courts were not exercising any of the judicial power of the United States conferred by

> the third article of the Constitution. They were not constitutional but legislative courts of the United States, exercising a jurisdiction conferred upon them by Congress by virtue of the sovereignty of the nation and of section 3 of article 4 of the Constitution, which empowers Congress to dispose of and make all needful rules and regulations respecting the territory belonging to the United States.
>
> "The power conferred upon the Dawes Commission and the United States courts in the Indian Territory by the act of June 10, 1896, and upon the Supreme Court by the act of July 1, 1898, to determine who were citizens of the Choctaw and Chickasaw nations, was legislative and not judicial, and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation."

Manifestly, if the duties of the Department and the courts were legislative in their nature, due process of law has not been accorded to those who had fixed or vested rights.

(f) *Legislative Courts and Commissions Can Not Construe Treaty Rights.*

All of the *legislative* findings, judgments, or decrees made or entered by the Dawes Commission, the Citizenship Court, and the Territorial District Court (improperly referred to in the statutes as a United States district court), of the rights of any claimant to enrollment as a *citizen* of these tribes, were based solely upon the *political* question of *citizenship*, and did not touch the question of *property* rights under the *treaties* and the *grant*. All the decisions of this court relative to such acts, thus far rendered, have had to do only with

the validity of the means Congress had adopted for determining the political question of *citizenship* and the effects of such judgments. In Wallace *vs.* Adams, 204 U. S., 415, 51 L. Ed., 547, 552, Mr. Justice Brewer said that in Stevens *vs.* Cherokee Nation, 174 U. S., 445, 43 L. Ed., 1041, 19 Sup. Ct. Rep., 722, this court—

> "entertained and decided the purely judicial question of the validity of the means Congress had adopted for determining the matter of *citizenship*. We did not attempt to pass upon the question of citizenship in any particular case, nor determine whether the applicant was or was not entitled to be enrolled as a citizen."

In Stevens *vs.* Cherokee Nation, 174 U. S., 445, 479, 43 L. Ed., 1053, this court said:

> "Was it the intention of Congress to impose on this court the duty of reexamining the facts in the instance of all applicants for citizenship who might appeal; of construing and applying the treaties with, and the constitutions and laws, the usages and customs of, the respective tribes; of reviewing their action through their legislative bodies, and the decisions of their tribal courts and commissions; and of finally adjudicating the right of each applicant under the pressure of the advancement of each case on the docket to be disposed of as soon as possible? Or, on the other hand, was it the intention of Congress to submit to this court only the question of the constitutionality or validity of the legislation in respect of the subject-matter? We have no hesitation in saying that in our opinion the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian Territory."

Appellants are not here seeking to have their *political* rights as *citizens* of the nations determined, but they

are seeking to secure the enforcement of their constitutional *property* rights under the *treaties* and the *grant*. The construction of treaties is the peculiar province of the *judiciary*, and not of *legislative* commissions. In Jones *vs.* Meehan, 175 U.S., 1, 32, 44 L. Ed., 49, 62, Mr. Justice Gray said:

> "The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."

This rule has often here found expresssion.

> Wilson *vs.* Wall, 6 Wall., 83, 18 L. Ed., 727, 729.
> Reichart *vs.* Felps, 6 Wall., 160, 18 L. Ed., 849.
> Smith *vs.* Stephens; 10 Wall., 321, 19 L. Ed., 933.
> Holden *vs.* Joy, 17 Wall., 211, 21 L. Ed., 523.

It was the subject of special consideration in New York Indians *vs.* U. S., 40 Ct. Claims, 448. So in the recent case of Garfield *vs.* U. S., 211 U. S., 262, 29 Sup. Ct. Rep., 62, 66, it was as to the Secretary, the Citizenship Court, and the Dawes Commission given full recognition, Mr. Justice Day, among other things, saying:

> "The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

More will be said upon this subject when we consider the question of the political, as distinguished from the vested, rights of complainants. The important question now to be considered is whether individual rights were vested.

4. The Government Policy and Purpose Was to Vest Individual Interests.

As stated (Rec., p. 32) by the trial court:

> "The first question to be considered is whether by the patent of 1842 the lands conveyed passed to the Choctaw and Chickasaw nations in trust for the individual members of said tribes then living and their descendants, as a designated class, so as to vest in each individual of said class a present vested right or interest in the said property; or, whether, on the other hand, it was a grant to said tribes for the common use and benefit of the members thereof while they should exist as nations and continue to live upon it, the membership not necessarily to be confined to those then in existence and their descendants, but to be determined from time to time by the laws and customs of the respective tribes."

The lower court (Rec., p. 35) sustained the latter proposition which appellants insist was erroneous.

(a) *Negotiations for the Treaty Proper to be Considered.*

As the patent of 1842 was issued pursuant to article 2 of the treaty of September 27, 1830, it is necessary to a proper understanding of this question to review briefly the situation and relations of the parties prior to, and when the treaty was concluded, and the intention and purpose of the contracting parties sought to be effectuated thereby. This may be shown by correspondence between the parties, official messages, papers, and correspondence and recorded historical events.

> U. S. *vs.* Choctaw Nation, 179 U. S., 494, 517, 45 L. Ed., 291, 300.

(b) *Government Policy Generally Considered.*

To dismember and ultimately extinguish the Indian tribes by the education, civilization, and assimilation of the members thereof into the citizenship of this Republic, has, from its inception, been the one object sought to be attained by the Government of the United States in its dealings with these people. As the transition from savagery to civilization has occurred, grants of land, either in fee or in trust for the use and benefit of the individual members have been made by the Government in keeping with its established policy of diverting tribal holdings into individual ownership and thereby encouraging the individual allottee to cultivate, improve, and render productive his allotment for his own individual use and the use of his family. That such was the policy of the United States prior to the treaty of 1830 with the Choctaws, appears from an examination of the early treaties entered into with various Indian tribes, reference to only a few of which is here necessary.

By article 4 of the treaty of 1816, with the Chickasaws (7 Stat L., 150), grants were made to individual Indians and their "heirs" so long as they and their heirs should occupy the lands.

By article 8 of the treaty of 1817 with the Cherokees (7 Stat. L., 156) reservations of land were made to those individual members of the tribes who desired to remain east of the Mississippi River and become citizens of the United States; the reservee taking a life estate with a reversion in fee to his or her children.

By articles 5, 6, 7 and 8 of the treaty of 1817, with the Wyandots (7 Stat. L., 160), grants of land *en bloc* were made in fee simple to members of the tribe therein designated to be either held in common or divided in severalty.

By article 3 of the treaty of 1819, with the Cherokees (7 Stat. L., 195), reservations in fee of 640 acres were made to Cherokees who desired to remain in Tennessee.

(*a*) *Treaty of 1820 With the Choctaws.*

That it was the policy of the Government of the United States in 1820 to gradually extinguish the Choctaw Nation by allotting the lands then held in common among the Indians in severalty and making the allottees citizens of the United States is clearly shown by the treaty entered into with the Choctaws in that year. By article 1 of the treaty of 1820 (7 Stat., 210), the Choctaws ceded to the United States "a small part" only of the lands they were then occupying. By article 2 the Government ceded to the Choctaws the identical lands, the title to which is now in controversy, and certain lands heretofore sold by the Choctaws and Chickasaws, the proceeds derived from which, are also the subject of this action. The object which the Government sought to effectuate by this treaty is set out in the preamble as follows:

> "Whereas it is an important object with the President of the United States, to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging, for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together . . ."

Only those Indians "who live by hunting and will not work" were to be collected and settled together on the western reserve, and provision was made for defraying the expenses of their removal. By the fourth article it was provided:

> "The boundaries hereby established between the Choctaw Indians and the United States, on this side of the Mississippi River, shall remain without alteration until the period at which said nation shall become so civilized and enlightened as to be made citizens of the United States and Congress shall lay off a limited parcel of land *for the benefit of each family or individual in the nation.*"

By the 9th article all those persons who had "separate settlements . . . within the limits of the lands ceded by the Choctaw Nation to the United States" and who desired to remain where they resided, were "secured in a tract or parcel of land one mile square, to include their improvements." Any one desiring to remove west within one year from the date of this treaty was to be paid the full value of his or her improvements. Certain portions of the ceded lands were to be sold for the establishment and support of schools, three-quarters of the proceeds derived from the sale of said lands to be expended in support of schools for those who remained in Mississippi, and one-fourth was to be expended for the establishment and maintenance of schools for those who removed to the western reserve.

That it was the policy of the Government to create individual estates in the common property of the tribe is clearly outlined in this treaty, entered into ten years before the treaty of 1830 was negotiated. Those only "who live by hunting and will not work" were to be transported to the western reserve, there to live under their own crude customs and laws until in line with the established policy they became sufficiently civilized and educated as a result of the schools established and aid extended by the Government, to receive their individual share of the common land by allotment in severalty.

Yet the trial court held (Rec., p. 32) that the *main*

object of the President of the United States by this treaty was to "perpetuate them as a nation," and "that these Indians would eventually take up the ways of the white man and become *owners* of the tribal lands in severalty appears at that time to have been deemed a condition *too remote* for consideration at that time." Thus, this treaty was, by the trial judge, construed contrary to the plain import and intent of the language used, in disregard of the established rules governing the construction of Indian treaties, contrary to the obvious object of the Government as outlined in its Indian policy and to the prejudice of appellants.

It is, therefore, far from true that prior to 1830 the Government was opposed to making grants to individual Indians. The opinion below was based upon the opposite view, for the trial judge (Rec., p. 32) said:

> "At the time of the treaty of 1830 and at the time the grant under consideration was made the Choctaw and Chickasaw Indians, as well as all other tribes or nations of Indians, held the lands then occupied by them as common tribal property and not in severalty. The United States, in dealing with the Indians, *had always dealt with them in their tribal or national capacity.*"

As emphasizing the vice of that view we consider in detail other treaties.

(c) *Grants Between 1820 and 1830.*

A few references will show that this governmental policy of tribal disintegration by reservations or grants of land either in fee to, or in trust for, individuals or designated classes of individuals, was by other treaties thereafter continued and was in full force when the treaty of 1830 was negotiated.

By the supplemental treaty of September 18, 1823,

with the Florida Tribe of Indians (7 Stat. L., 226), reservations *en bloc* of large tracts of land to be thereafter located were made for certain individuals and their "connections."

By the fourth article of the treaty of 1826 with the Chippewas (7 Stat. L., 290) grants to be hereafter located were made to certain "half-breeds."

By the sixth article of the treaty of 1826 with the Pottawatomies (7 Stat. L., 295) grants of land were made to a large number of persons and their "heirs" without the right of alienation either by the grantee or his heirs.

By the ninth and tenth articles of the treaty (7 Stat. L., 328) with the Sacs and Foxes, etc., negotiated July 15, 1830, and proclaimed February 24, 1831 (the same day the treaty of 1830 with the Choctaws was proclaimed), grants of land were made *en bloc* for the "half-breeds" of the Sioux, Omaha, Ioway, and Ottoe bands, with this proviso:

> "But the President of the United States may hereafter assign to any of the said half-breeds *to be held by him or them in fee simple*, any portion of said tract not exceeding a section of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding article."

By the fifth article of the treaty of 1825 with the Osages (7 Stat. L., 240), a large number of unlocated unconditional grants were made to "half-breeds."

By the sixth article of the treaty of 1825 (7 Stat. L., 244) with the Kansas Indians, unlocated unconditional reservations were made for a large number of individuals.

By article three of the treaty of 1826 (7 Stat. L., 300) with the Miamis, unlocated grants of land were made to certain persons designated in the schedule attached and their heirs, "never to be conveyed without the consent of the President of the United States." Similar grants

were also made by article three of the treaty of September 20, 1828, with the Pottawatomies (7 Stat. L., 317) by article four of the treaty of 1829 with the Chippewas (7 Stat. L., 320), by article 5 of the treaty of 1829 with the Winnebagos (7 Stat. L., 323).

(d) *View of the Secretary of War Immediately Prior to the Treaty of 1830.*

On June 1, 1830, Secretary of War John H. Eaton, wrote Hon. George R. Gilmer, governor of Georgia (Senate Doc. 512, vol. 2, p. 1, 23 Cong., 1st Ses.), as follows:

> "SIR: I have deferred making any formal communication to you on Indian affairs, desiring to see the final decision which would be given by Congress upon questions, so interesting—questions which are important to the people of this country, and particularly so to the Indians themselves. Whatever argument and fancy may suggest, it is undeniably true, that to remove from their present homes, affords the only hope for their preservation and happiness. *Owners in fee of the country, they will then begin to look to an ownership of the soil in severalty*—to the extension of agricultural habits, and to the improvement of their farms. Their wandering habits may, after a time, be thus corrected, and their attention turned to industry and domestic pursuits. . . ."

Can any one doubt from this communication that the intention of the Secretary of War, the officer who had direct charge of all Indian matters, was not to so grant lands to the Indians that the absolute title should pass with the ultimate object of dividing, in severalty, the lands granted in common.

(e) *Act of May 28, 1830.*

The provisions of the treaty of 1820 were never complied with by the Choctaws, who in the year 1830, con-

tinued to reside on their eastern lands. In this year the differences between the white people and the Choctaws, as well as all other Indians living in the Southern States, became acute. The authorities of the States of Mississippi and Alabama were enforcing or attempting to enforce the State laws against the Choctaws within the limits of their reservation. The white settlers were encroaching upon the Indian lands. The Indians were offering armed resistance. The citizens of the States were appealing to the President and Congress to remove the rebellious Indians west of the Mississippi. President Jackson in his annual message to Congress under date of December 8, 1829 (vol. 2, Messages and Papers of the Presidents, 456–459), reviewed the conditions of the various tribes, the conflicts between the authorities of the States and the Indians and pointed out the desirability of securing the removal west of the Mississippi river of *such* Indians as refused to obey the laws of the states and were unwilling to take up homes and adopt the ways of civilized life. He says (p. 456):

> "The condition and ulterior destiny of the Indian tribes within the limits of some of our States have become objects of much interest and importance. **It has long been the policy of our Government to introduce among them the arts of civilization, in the hope of gradually reclaiming them from a wandering life.** This policy has, however, been coupled with another wholly incompatible with its success. Professing a desire to civilize and settle them, we have at the same time lost no opportunity to purchase their lands and thrust them farther into the wilderness. By this means they have not only been kept in a wandering state, but been led to look upon us as unjust and indifferent to their fate. . . .
>
> "As a means of effecting this end, I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and

without the limits of any State or Territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secure in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes. There the benevolent may endeavor to teach them the arts of civilization, and, by promoting union and harmony among them, to raise up an interesting commonwealth, destined to perpetuate the race and to attest the humanity and justice of this Government.

"This emigration should be voluntary, for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land. But they should be distinctly informed that if they remain within the limits of the States they must be subject to their laws. *In return for their obedience as individuals they will without doubt be protected in the enjoyment of those possessions which they have improved by their industry.* . . ."

This was followed by the act approved May 28, 1830 (4 Stat., 411), authorizing the President to exchange with any Indian tribe that might be induced to remove west the possessory right to occupy western lands for the possessory title to eastern lands surrendered by the Indian tribe, section 3 of which provided:

"And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to *them, and their heirs* or successors, the country so exchanged with them; and if they prefer it, that the United States will

> cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States if the Indians become extinct, or abandon the same."

No exchange of land was made by force of this act, though in treaties thereafter made with Indian tribes it was not infrequently provided that the conveyance of the western land should be in conformity with section 3 of this act.

(f) *Negotiations Leading Up To and the Adoption of the Treaty of 1830.*

On March 17, 1830, the Choctaws submitted to President Jackson a draft of a proposed treaty containing the terms upon which they were willing to remove to the western reserve. President Jackson redrafted the proposed treaty, and on May 6, 1830, transmitted the two drafts, together with a protest signed by "certain persons claiming to be full bloods" to the Senate of the United States accompanied by a special message (2 Messages and Papers of the Presidents, 478) explanatory thereof, and requested the views of the Senate with reference to the terms upon which it might be advisable to conclude a treaty with the Choctaws. The Choctaw draft provided:

Article 1:

> "The United States shall secure to the said Choctaw Nation of red people the perpetual peaceful possession of all that tract of country, known and described in a treaty as the Choctaw land, west of the Mississippi River, embraced in the following lines and limits, viz, . . . and immediately on the ratification of this treaty a patent shall be issued by the President of the United States, granting and transferring to the said Choctaw Nation of red people **a full and perfect**

> **title in fee simple** to all the land within the before described limits, and **forever warranting and defending the peaceable possession of the same to the Choctaw Nation, their descendants,** and **citizens.**"

Article 30:

> "This treaty is the only proposition that the Choctaw Nation will ever make to the United States, and proposes the only terms on which the said nation will emigrate to the west. . . ."

The draft prepared by President Jackson was identical with article 1 of the Choctaw draft with the omission of the word "*citizens.*" By this change President Jackson intended that the grant was to be made in fee simple to the Choctaw Nation for the exclusive use and benefit of the Choctaw people and their "*descendants,*" and not for the use and benefit of the "Choctaw Nation, their descendants and *citizens.*" (Certified copies of original documents are filed as a part of the record herein.)

In the protest of the "full-bloods" against the ratification of this proposed treaty we find an explanation of the action of President Jackson in striking off the word "citizens." It is evident from this protest that the feeling between the "half-breeds" and "full-bloods" was very bitter, and that the "half-breeds" were attempting to not only supersede the "full-bloods" in the control of tribal affairs, but were also endeavoring to acquire large and valuable grants for themselves to the exclusion of the "full-bloods." In this protest (certified copy of which has been filed with the clerk of this court, p. 21) they say:

> "If any people in the world can call any portion of the land of this world their own, we, the real Choctaws, can truly say, that this is our own land—this is our own country. Therefore, if this country is to be treated away, who but the real Choctaws should have the honor of selling it? Our right to the soil we live on is paramount to all

others. Let, then, the Government treat with us, your children, who are the true inheritors of all this country, and who alone have the right of selling or disposing with it as they may think proper. We say, we are your children. You have acknowledged us as such. It was a full-blooded Choctaw that first gave his hand to the great and good Washington, and called him father. It was no proud and conceited half-breed. As children, we have been dutiful towards you; we have not been unruly and fractious at no time, as many of your other red children have been, and done you injury. No! we have at no time ever done you any injury, but we have done you good whenever we had it in our power so to do. We ask of our Great Father, the war chief Jackson, who was it that fought by his side in the late war? Was not it our Pushmataha and Mushulatubbee, and their brave warriors? Let him remember the good deeds we have rendered for the United States and for our Great Father. Let him remember our unchangeable friendship, and above all, remember us as a poor, helpless, and distressed people. If there is a treaty made between the Government and the Choctaws, let all, the full-blooded as well as the half-breeds, be equals in the profits arising from the treaty. This will be the only way to give satisfaction to all. We say we are willing to sell our country; but never, under any conditions, wherein it will make a few very rich. Five sections, it seems, has been allowed Garland, two for Joel R. Neil, and the same to J. L. McDonald, Israel Folsom, and George Hawkins. Here you see, in this proposition, which has, no doubt, been presented to you by David W. Haley, as being from the whole nation, and which, if it is agreed to, will make only the half-breeds rich."

Again (p. 24) they say:

"FRIEND AND BROTHER: In consequence of the iniquitous proceedings of the half-breed chiefs and their party, a great many of the people, from most

> every section of the country, have met together and joined in making you this communication. They have, at the same time apppointed a General Council, to take place on the 16th of April, where every man is to attend with guns and deadly weapons. We are determined to die, or have justice done us, and never to consent or agree to any treaty that is made in the dark, by designing and avaricious men, such as Leflore and Folsom."

The acute feeling existing between the "mixed-breeds" and "full-bloods" and the constant and insistent efforts of the white people to become members of the tribe for purely mercenary purposes emphasizes the action of President Jackson in striking out the word "citizens" so as to limit property rights under the grant to the "then blood members and their descendants," and thus excluding adopted "citizens," while the inclusion of the word "citizens" in the draft prepared by the "mixed-breeds" indicates a desire on their part to extend the benefits of the grant to not only the "then blood members of the Choctaw tribe and their descendants," but to adopted "citizens" of the tribe not of Indian blood. From these drafts of the proposed treaty and the protest there can be no doubt that the very question now in issue was in the mind of President Jackson, and that he sought by the elimination of the word "citizen" to prevent adopted citizens from becoming beneficiaries under the proposed grant, and to preclude such a construction of the instrument as was below placed upon the treaty of September 27, 1830.

The Senate Committee on Indian Affairs stated in its report to the Senate (4 Ex. Journal, III) that after fully considering all the documents transmitted by the President relative to the proposed treaty with the Choctaws, it did not deem it advisable to recommend the ratification of the treaty, for, among other reasons, that one of

the documents transmitted was a protest from one of the districts of the Choctaw Nation; that as the treaty had not been negotiated by government officers after a poll of the nation, the committee had no way of knowing what percentage of the Choctaw people were in favor of making any treaty with the United States, and therefore recommended that the Senate advise the President by resolution not to "make or ratify" the proposed treaty. On May 27, 1830, the Senate adopted (4 Executive Journal, 119) the following resolution:

> "*Resolved*, That the Senate do advise the President of the United States not to make or ratify the treaty which the Choctaw Indians have proposed in the project submitted to him dated the 17th day of March, 1830, and which accompanied his message to the Senate on the 6th instant" (Executive Journal, vol. 4, p. 111).

President Jackson thereafter advised the Choctaws of the action of the Senate, and informed them that he would meet the Choctaws and Chickasaws at Franklin, Tenn., and personally advise them of the policy and intentions of the Government, in order that a treaty might be negotiated which would be acceptable to the Senate.

Accompanied by Secretary of War, John H. Eaton and General John Coffee, President Jackson arrived at Franklin, Tenn., on Monday, August 23, 1830. The Choctaws were not present. The Chickasaws, who had assembled were addressed by President Jackson at some length, in which address (Sen. Doc. 512, vol. 2, 23rd Con., 1st Ses.), the President urged the Chickasaws to consent to remove west of the Mississippi, and as an inducement to them pointed out that their new homes west of the Mississippi would be the property of **them and their children**. The President (id. p. 241) said:

> "Determine what may appear to you best to be done for the benefit of **yourselves and your**

> **children**. The only plan by which this can be done, and tranquillity for your people obtained, is that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your Great Father will give it to you forever, that it may belong **to you and your children** . . ."

On the 26th of August the President and his commissioners met the Chickasaw delegates. J. McLish, secretary of the Chickasaw Nation, delivered (2 Sen. Doc., 512, p. 243; 23 Cong., 1st Ses.) the reply of the Chickasaws to the address of the President in part as follows:

> "Friends and brothers, our Great Father, the President, has communicated to us through you (Major Eaton and Gen. Coffee), his earnest desire to make us a prosperous and happy people; to accomplish this great object, that is to us so desirable, he proposes to give us a country, west of the Mississippi, in exchange for the country we now possess, **in fee simple**, or to use his own words, **'as long as the grass grows and water runs'** (Sen. Doc., 512, vol. , p. 244, 23 Cong., 1st Sess.).

In an address (2 Sen. Doc., 512, p. 245–6, 23 Cong., 1st Sess.) to the Chickasaws on August 26th, Secretary of War John H. Eaton said:

> "We wish to give you a pleasant country, of good soil, good water and climate, and in extent sufficient for all your wants; and when you are gone, **for the wants of your children;** and again other tribes wish to remove, and they may select the lands which now you have the opportunity to obtain **for your children,** but which presently may be gone from your reach."

President Jackson then instructed (Sen. Doc., 512, vol. 2, p. 247, 23d Con., 1st Ses.) his commissioners, Secretary of War John H. Eaton and General John Coffee, to continue the negotiations with the Chickasaws, and then proceed to Mississippi and conduct negotiations

with the Choctaws, with the object in view of entering into treaties with both tribes and specially instructed his commissioners *"to act liberally towards them."*

On September 15, 1830, Secretary of War John H. Eaton and General John Coffee arrived at the Indian agency at Dancing Rabbit Creek, Miss., in pursuance with the instructions of President Jackson. Negotiations looking to the formulation of a treaty with the Choctaws were immediately thereafter commenced (Journal of Proceedings, Sen. Doc., 512, vol. 2, p. 251, 23d Cong., 1st Sess.).

On September 18, 1830, Secretary of War John H. Eaton and General John Coffee advised (Sen. Doc., 512, vol. 2, p. 258, 23d Cong., 1st Ses.) the Choctaws at the treaty grounds as follows:

> "BROTHERS: In 1820, by a treaty made with you at Doak's stand by your present Great Father, an extensive and fine country was **given to you for the use of your people.** It was a gift to you, for the country you ceded to the United States was paid for fully. It was the understanding at the time that the Choctaws would remove, and on that account was it that a large, saleable, and fertile country was provided for your nation and your people. Ten years have passed by and you are still here. The country intended for you yet remains wild and unsettled.
>
> "BROTHERS: A fertile country beyond the Mississippi and another possessed here is more than you should expect. If you will not remove, other Indian tribes may desire to do so, and where they shall select to settle, a home must be furnished; others wanting it, the country should not remain a desert. You must decide which you will take and which you will live upon; both countries you can not possess; it is unreasonable to expect it. If you prefer to live under our laws and customs, remain and do so, **and surrender the lands assigned to you west of the Mississippi** or otherwise remove to them." . . .

Thursday 23, 12 o'clock:

"The commissioners attended at the council house and received, through the chairman of the committee, Peter Pitchlyn, their determination and report. They stated their great surprise at being informed that they could not retain **the lands which by the treaty of 1820 had been secured to them; that they had concluded not to treat for a sale of their lands.** The report being received, the Secretary of War rose and made an address to them verbally before the council; told them of their situation and condition, and of the impossibility on the part of their Great Father, to prevent the operation of the laws over them; that they had been badly advised, and were putting reliance in persons, who, while they professed to be their friends, would be sure to forget them in the hour of difficulty and trial. . . . The Secretary of War requested them to understand that their removal was to be a matter for their own reflection and judgment; unless they really believed, in consenting to emigrate, their happiness could be promoted, he begged them not to think of removing; that they must go freely, and of their own accord, or not at all. They had today declared that they were unwilling to remove. He supposed they had arrived at the conclusion that they could remain where they were, and live under the laws of Mississippi, and of course the commissioners had nothing more to say or to advise. They would now take their leave and go home. It was a matter of regret, he said, that their judgment had erred so much in the decision they had made. throughout, the language of all of them had been that they could not live under the white man's laws. If such was not their deliberate opinion, why had they avowed it, and why did they solicit the President to send commissioners to treat with them when they could not but know it was attended with great expense? He said he well knew that many of them could live

anywhere where he could; their education and intelligence authorized him to say and believe so; but the common uninstructed Indian could not. For them to live under laws which they could neither read nor be made to understand was expecting too much. And what are they to do under the decision just pronounced? Will they resist the laws? The sheriff must enforce them. Will they oppose him with their guns and tomahawks? While the Choctaws could raise one warrior to resist there would be found one hundred or one thousand to one to oppose that resistance and to enforce the law. These are things which seriously they should have considered before their decision was pronounced. The commissioners, he said, had nothing further to remark, but to take leave of them and go home, and accordingly they retired from the council.

"Shortly afterwards they were waited upon by several persons of the committee with a request that they would not leave the treaty ground; that they had considered of the remarks which had been made to them and had no doubt, if the commissioners would remain a few days longer, that a treaty could be made. To this the commissioners assented."

Saturday 25th, 11 o'clock:

"The council met: present, the Commissioners, the three chiefs, captains, and warriors of the nation; when the following terms were proposed and interpreted . . . The foregoing having been read and explained, the three chiefs and others of the principal men addressed the council and urged the acceptance of the terms which were offered. The explanations being made, the council broke up."

Sunday 26th:

"Some conference at the commissioners' quarters took place this morning between the chiefs

> and some of the captains and head men, in which several *alterations and additions* were made to the terms proposed."

Monday 27th:

> "A meeting at the council house took place today. The treaty as drawn up was submitted, interpreted, and explained; and at 1 o'clock it was signed. . . ."

Articles one and two of the treaty as drafted by the commissioners representing the Government of the United States and the changes and interlineations made therein before it was signed as shown by the original document on file in the office of the Secretary of State are as follows:

ARTICLE 1st.

> "Perpetual peace and friendship is pledged and agreed upon by and between the United States and the Mengoes, chiefs, & Warriors of the Choctaw Nation of Red People; and that this may be considered the . . . treaty existing between the parties all other treaties heretofore ^ inconsistent with the provisions of this existing ^ are hereby declared null and void."

ARTICLE 2d.

> "The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of ^ in fee simple to them, & their descendants to inure to them while they shall exist as a nation and live on it country West of the Mississippi River ^ beginning near Ft. Smith . . ."

(Photographic copy of original document on file at the State Department has been filed with the clerk of this court as part of the record in this case).

It will be observed that a *special* grant was to be made and that no mention was made in all the negotiations leading up to the signing of the treaty of 1830 of the grant being made to the Choctaw Nation. The Choctaws had insisted at all times upon an absolute grant in fee simple to "them and their children" and the Government officers, including the President of the United States, had assured them that it was the desire of the Government to grant the land to "you and your children forever." The first draft of the treaty made by the Government officers did not provide for either a grant in fee simple or limit the grant to the exclusive use of "them and their children," but among the interlineations made at the insistence of the Indians at the conference on Sunday morning before the treaty, as shown by the photographic copy, was signed, the following appears:

> "In fee simple to them and their descendants to inure to them while they exist as a nation and live on it."

The clear understanding of all the parties was that the grant was to be **"in fee simple to them** (meaning to the then members of the tribe) **and their descendants."** This understanding was carried to full fruition by article 2, wherein for the first time the name of the Choctaw Nation appeared in connection with the grant. A fee simple grant could not have been made directly to "them and their children" without lodging in the then living members of the tribe and their children an absolute ownership. By making the grant to the nation, "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it" a trust was created. This continued in full force so long as the nation existed and the land was used as a common home for the "then members of the tribe and their descendants." When either of these conditions occurred the

title ceased to be held in trust and inure to the benefit of descendants. The then living members of the designated class of people became the absolute owners in common of the estate.

Appellants' contention that both of the contracting parties to this treaty had in mind the fixing of individual property rights is reinforced by other provisions of the treaty. Thus, article 4 provided:

> "No Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of red people and their *descendants;* and that no part of the land granted *them* shall ever be embraced in any Territory or State."

Here the rights of *descendants* were recognized, and Article XII required—

> " . . . *private property* to be always respected and on no occasion taken for public purposes without just compensation being made therefor to the *rightful owner.*"

It therefore follows that *private* ownership was also in mind. By articles 14 and 15 (7 Stat. L., 333) grants were made to *classes* of persons, including "heads of families," "unmarried children over ten years of age," and "children under ten years of age" who desired to remain east. By accepting grants under the fourteenth article the grantees included in the *designated classes* mentioned therein were to forfeit all right to share in the Choctaw annuities derived from the sale of the eastern lands of the Choctaws, but they still retained their share of the western lands.

Throughout this entire treaty the Government dealt with the Choctaws both individually (many individual grants being made), and by classes, such as "them and their descendants" (which class embraced the whole people, including all other classes), "heads of families,"

"children over ten years of age," "children under ten years of age," and "certain captains," as will appear from the 14th, 19th, and supplemental articles, thus clearly indicating that it was not the intention of the Government to deal with them exclusively as a nation, and precluding the idea that individual rights were not contemplated and recognized.

(g) *Understanding of Government as Shown by the Correspondence Following Ratification of Treaty of 1830.*

An examination of the correspondence following the ratification of the treaty of 1830 will clearly disclose that the understanding of the Government officers was that the grant provided for by Article 2, was not to the Choctaw Nation without limitation, but was limited exclusively to the then "Choctaws and their *descendants*."

On December 30, 1831, Secretary of War, John H. Eaton, and Gen. John Coffee, who negotiated the treaty of 1830 with the Choctaws, addressed the Chickasaws at Franklin, Tenn. (Sen. Doc., 512, vol. 9, pp. 15, 16, 23d Cong., 1st Sess.), in part as follows:

> "BROTHERS: The country which your Great Father proffered you is no longer his. It has been ceded to other tribes and now the only alternative before you is to obtain **by purchase a portion of the Choctaw lands.** They are your neighbors, friends and brothers, and have it to spare. A hope is entertained that, mindful of their ancient friendships and being possessed of a larger country than they can ever want, they will not fail to accommodate you if your wishes be made known to them in an earnest, frank, and proper manner. Now is the time to act. Decline, and put it off to some future time, and it may be too late. The wants and conditions of the Chickasaws being frankly and fully made known, their

Choctaw brothers will not turn away and leave them to suffer. Their Great Father will not think so unkindly of them as to suppose they will refuse, when he is willing to make them a reasonable and fair compensation for their liberality."

On March 31, 1831, Secretary of War Eaton wrote General Coffee (Sen. Doc., 512, vol. 2, p. 274, 23rd Cong., 1st Ses.), in part as follows:

"We are much embarrassed on this subject. The Chickasaws with all their desire to emigrate, can not do so. If a suitable and approved home can not be provided, they must abide where they are, and suffer all the inconveniences which subjection to State laws must impose. Within the Choctaw country there is abundant room for both tribes. Their population we estimated at twelve thousand; but let it be taken at fifteen thousand and let the Chickasaws, as the fact is, be set down at five thousand, which will be in all twenty thousand. *The country claimed by the Choctaws contains not less than sixteen millions of acres, which will be 800 acres to each soul; an ample amount, and more than sufficient for all their wants.*

"But while the Choctaws are disposed to receive the Chickasaws the latter are not willing to become a part of their tribe and desire to remain as heretofore, a separate independent people; an arrangement to this effect, with the concurrence of both parties, might perhaps be made. Let the Chickasaws have a district within their country to be subject to their own rules, with the understanding that each of the other three districts of the Choctaws under their respective chiefs shall also be governed independently by their laws. That a general chief shall be appointed every two or three years, with delegates from each district, to make laws for the whole. Under such an arrangement, properly guarded, the Chickasaws may be satisfied."

On December 6, 1831, Secretary of War Eaton and General Coffee, representing the Government, advised the Chickasaws at Oaka Knoxabee Creek (Sen. Doc., 512, vol. 9, p. 17, 23d Cong., 1st Ses.) as follows:

> "One hope remains—the Choctaws, near whom you have so long resided, possess a country to the west, infinitely greater in extent than is required for their use and want. Within its boundaries there is ample territory of good climate and fertile soil, and which is more than adequate to the wants of both nations. Relying on their liberality, and the friendship which has long subsisted between them and the Chickasaws, a hope is entertained that, looking to their unpleasant situation and being influenced by ancient friendships, they may be disposed to take with them their Chickasaw brothers and consent that they participate in the ample possessions they have. How you shall unite, on what terms, and what general principles of government shall be agreed upon, are considerations for you and them to arrange and settle. Your Great Father, anxious to advance the interests and happiness of his red children of the Chickasaws, will cheerfully assist them in rendering a fair equivalent to their Choctaw brothers for whatever privilege of settlement they may be disposed to grant. . . .
>
> "By the laws of the United States no contract for the purchase of land can be entered into by Indians unless it be in the presence of commissioners who represent the Government. . . ."

At Oka Knoxabee Creek, December 7, 1831, Commissioners Eaton and Coffee advised the Choctaws (vol. 9, pp. 17–21) as follows:

> "The treaty, which last year was concluded, he is happy to learn, is pleasing and acceptable to his Choctaw children. That which was entered into with the Chickasaws has not been available, because it was not in their power to find a comfortable home to which they could remove. . . .

"The country west of the Mississippi, which is **secured** by the treaty of Dancing Rabbit, is sufficient for an infinitely greater population than the Choctaws have. The population of each nation being united, more land will be possessed than is sufficient for the uses and purposes of both. . . .

"In so important a matter as this all local considerations and selfish thoughts ought to be laid aside. The distinguished men of the Choctaws and Chickasaws should think only of the best means to preserve their respective nations. The hunters' life should be exchanged, or only pursued for amusement, and the **plough** made to assume the place of the rifle. Intelligence should be diffused amongst the people and the pieties of religion encouraged to enter the places where superstition has long maintained its sway. Rational government should be resorted to and wholesome laws substituted for the will of rulers who may be chosen to preside. Let the red men of the forest forsake their wandering ways, which have so long retarded their march to civilization; for then only can they hope for that prosperity and happiness which may give to them a standing with the civilized and enlightened of the world. . . .

"BROTHERS: We come to visit you as friends. We earnestly desire your prosperity and seek no other object. **We have not heretofore deceived you, nor will we now.** A new era is opening upon your people. Our desire is, by disclosing obvious truths to awaken you to a necessity of your essential interests. Concede to your Chickasaw brothers a portion of **your** country. By doing so both will be benefited. Assent, and the condition of each will be improved; but refuse, and your older brothers will be constrained to languish under that state of things, submission to the white man's law, which you have already confessed your people could not bear, and which consequently has occasioned their removal from the land of their fathers. . . .

"**Brothers:** Did you possess a country merely sufficient for the wants of your people, your Great Father would forbear to proffer the request which is now submitted. **But the territory owned by the Choctaws** is fully equal to that which they and the Chickasaws together occupy on this side the Mississippi, and superior in climate and fertility of soil. . . .

"Or, if this be not acceptable to both nations, and a defined plan of Government can not be agreed upon; then for consent to be given and an agreement to be made, that the Chickasaws shall occupy and independently hold, such portion of the Choctaw country, as may be approved by their brothers, the Choctaws. For this liberality, your Great Father will consent to pay what may be considered reasonable and proper. Whatever assistance we can render, in forming with you a plan of Government and union, for the advancement and prosperity of both nations, will, (if requested), be cheerfully given. In the meantime, until a plan be agreed upon, let your brothers, the Chickasaws, participate in **your** lands . . ."

On January 15, 1832, the Chickasaws in council advised Secretary Eaton and General Coffee (vol. 9, p. 12), as follows:

"We do not wish to convey the idea, from what we have said, that we wish an amalgamation with the Choctaws. We are as desirous of preserving our national character, as they possibly can be to preserve theirs. This is natural. But if, within their country west of the Mississippi a tract of land according with the provisions of the treaty of Franklin can be obtained, exclusively for the use of the Chickasaws, we are willing to remove to it. . . .

"We are aware that the country offered to us at that time is *no longer the property of the United States.* We are sorry for it. Having, from

> our first acquaintance, confided in the talks delivered us by the United States' authorities, we are disposed to acknowledge that the only hope that now remains for us to avoid a state of things, the realities of which we would deeply deplore, is to endeavor to acquire a portion of the Choctaw *lands.* . . ."

Throughout these entire negotiations Secretary of War Eaton, speaking for the President, repeatedly assured the *Choctaws* that they were the owners of the land, and informed the Chickasaws that the only way they could acquire an interest in the property was "by purchase from the Choctaws." "We have not heretofore deceived you, nor will we now," was General Eaton's solemn pledge to the Choctaws and Chickasaws, and as an inducement to the Choctaws and Chickasaws to enter into the treaty it was pointed out by the Secretary of War that the lands owned by the Choctaws were sufficient for the wants of all the Choctaws and Chickasaws being "800 acres to each soul." Throughout all the negotiations both before and after the signing of the treaty, no mention is made of any conveyance to the "Choctaw Nation," but in each instance in which the property is referred to it is spoken of as the property of the "*Choctaws.*"

(h) *Rules Governing Construction of this Treaty.*

The rule that must govern the construction of the treaty of September 27, 1830 (7 Stat., 333), was either ignored or overlooked by the court below. Article 18 provides:

> "And further it is agreed, that in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

So that if there is any doubt as to the correct construction of article 2, that doubt must be resolved in favor of appellants.

But if this were otherwise under the general rules governing the construction of Indian treaties appellants' contention must be upheld. The construction of Indian treaties has been a subject of careful consideration by this court and is no longer a subject of controversy. In U. S. *vs.* Choctaw Nation, 179 U. S., 494, 531, 45 L. Ed., 291, 306, Mr. Justice Harlan said:

> "There was much discussion at the bar as to the principles that should govern the court when determining the scope and effect of a treaty between the United States and Indian tribes. All agree that as a general rule in the interpretation of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used—the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted according to their natural and ordinary significance. If the words are ambiguous, then resort may be had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument and place the court in the situation in which the parties stood when they signed the writing to be interpreted.
>
> "To what extent, if at all, have these rules been enlarged or modified when the instrument to be interpreted is a treaty between the United States and Indian tribes? In the Kansas Indians, 5 Wall., 737, 760, sub nom. Blue Jacket *vs.* Johnson, County Comrs., 18 L. Ed., 667, Wan-zop-e-ah *vs.* Miami County Comrs., 18 L. Ed., 674, it was said that enlarged rules of construction have been adopted in reference to Indian treaties, citing as the words of Chief Justice Marshall, in Worcester *vs.* Georgia, 6 Pet., 515, 563, 582, 8 L. Ed., 483, 502, 508 (but

which were in fact the words of Mr. Justice McLean in his concurring opinion in that case), the following: 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' Mr. Justice McLean further said: 'How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' In United States *vs.* Kagama, 118 U. S., 375, 383, 384, 30 L. Ed., 228, 230, 6 Sup. Ct. Rep., 1109, the Indian tribes in this country are spoken of as wards of the Nation, communities dependent for their food and their political rights, as well as for protection, on the United States. And in Choctaw Nation *vs.* United States, 119 U. S., 1, 28, 30 L. Ed., 306, 315, 7 Sup. Ct. Rep., 75, it was said that the relation between the United States and the Indian tribes was that of superior and inferior, and that the rules to be applied in the case then before the court were those that govern public treaties, which, even in case of controversies between nations equally independent, were not to be interpreted as rigidly as documents between private persons governed by a system of technical law, 'but in the light of the larger reason and the superior justice that constitute the spirit of the law of nations.' In Jones *vs.* Meehan, 175 U. S., 1, 11, 44 L. Ed., 49, 54, 20 Sup. Ct. Rep., 1, it was said that a treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

"But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear

> import of its words. . . . What was said in the Amiable Isabell, 6 Wheat., 1, 71, 72, 5 L. Ed., 191, 208, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: 'In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.' . . . In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty, equally give the rule to judicial tribunals."

Are not the words used in article two of the treaty clear and explicit? Is it not plain that the grant to be made was a *special* grant? Have not the words "in fee simple" always had a definite, well understood meaning? For what purpose were the words "to them and their

descendants" used except to designate the class of persons for whose exclusive use the grant was to be made? Are the words "to *inure* to *them* while they shall exist as a nation and live on it" susceptible of misunderstanding? Can this article be so construed as to pass to the nation the unlimited title to the property without the court incorporating into the article something entirely "inconsistent with the clear import of its words?" Unless this can be done, the construction of the trial court must be rejected and appellants' construction upheld.

If, on the other hand, it should be held that the language contained in article two is ambiguous, that ambiguity is completely removed by an examination of the correspondence preceding and succeeding the signing of the treaty. Three distinct acts that clinch appellants' contention as to the understanding and intention of the contracting parties to this treaty are:

First, the fact disclosed in the protest of the "full-bloods" to the proposed treaty rejected by the Senate that the "mixed-breeds" were attempting to secure control of the affairs of the nation and acquire for their exclusive use, valuable portions of the common property, and the evident determination of the "full-bloods" that whatever rights were acquired under the new treaty should be confined to the "real Choctaws."

Second, the action of President Jackson in striking out the word "citizens" from the draft of the treaty so that the grant would be limited to the "Choctaws and their descendants."

Third, the inclusion in the treaty, after careful deliberation, and at the insistence of the Indians of the words "in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it." As the inclusion of these words were, as shown by the council record, only after deliberation by both parties, and at the insistence of the Indians, it can not now be

pretended that they were not inserted by interlineation for a definite purpose.

The personal pronoun "*them*" could have reference only to the then *members* of the tribe. Throughout all the correspondence preceding and succeeding the signing of the treaty the word "children" appears. The evident object and intent of the parties was to limit the estate to the exclusive use of themselves, their children, their grandchildren, and so on to the remotest degree, or until the nation ceased to exist or the land was not used as a common home for all. But this word was not appropriate for the purposes of the treaty or the grant. A grant to "them and their children" might have limited it to the first generation and to legitimate children only. The Choctaws were then living in a state of nature (Wall *vs.* Williamson, 11 Ala., 839; Johnson *vs.* Johnson's Adm., 9 Mo., 88); polygamous marriages were common, and the use of the word "children" in its technically legal sense might have excluded a large majority of their issue. Therefore, it was that the word "descendants" was used. This word can not be misunderstood. It does not mean heirs, successors, citizens, or residents, actual or implied. It has a distinct meaning. It includes any person who is descendant from another to the remotest degree.

In 13 Cyc., 1047–1049, it is said:

> "Descendant. One who descends as offspring, however remotely; correlative to ancestor or an ascendant; one who has issued from an individual, including children, grandchildren and their children to the remotest degree; issue; issue of the body of the person named of every degree; issue of any degree; the issue of a deceased person; any person proceeding from an ancestor; in any degree; offspring in the line of generation; offspring; a person who is descended from another, that is, who proceeds from the body of

another, however remotely; all those who proceeded from the body of the person named; children and grandchildren; children and their children and their children to any degree; an heir in the direct descending line. The term does not mean any relative to whom in some possible contingency property might descend, but lineal descendants—issue of the body; and as used in its natural and ordinary sense, as a definite description of all those persons living at a particular time, it means those who can trace their origin, immediately or remotely, to a given person as an ancestor. As used in a statute the term may mean those who descend in a direct line from the husband—children, grandchildren, etc., in statutes disposing of real and personal estate in cases of intestacy, one sprung from the body of the person spoken of—a lineal descendant. Again, when used either in written or spoken language, when unconnected with any qualifying word, the term is used to describe the children, grandchildren, etc., of the person named, and where that person is dead, it embraces his posterity, however remote, but it is confined to them."

In 9 Am. & Eng. Enc. L. (2d Ed.), 399, it is said:

"A person who is descended from another. Any one who proceeds from the body of another, however remotely, is a descendant of the latter. The word is the converse or opposite of 'ascendant,' rather than of 'ancestor,' taking all these words in the legal technical sense. 'Descendants' can not be construed to include any but lineal heirs, without clear indication of a contrary intention. Thus the term does not include collateral relations, nor ancestors."

In Ralph *vs.* Carrick, 11 Ch. Div., 873, James, L. J., said:

"But in this case there is what appears to me to be a perfectly unambiguous word—descendants; a word which I venture to say no layman or

lawyer would use to designate children only. Descendants means children and their children and their children to any degree, and it is difficult to conceive any context by which the word descendants could be limited to mean children only."

In 1 Bouvier Law Dict. (Rawles Rev.), 550, it is said:

"Those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree. Ambl., 327; 2 Bro. Ch., 30, 230; 1 Roper Leg., 115. The descendants from what is called the direct descending line. The term is opposed to that of ascendants. There is a difference between the number of ascendants and descendants which a man may have; every one has the same order of ascendants, though they may not be exactly alike as to numbers, because some may be descended from a common ancestor. In the line of descendants they fork differently according to the number of children, and continue longer or shorter as generations continue or cease to exist. Many families become extinct, while others continue; the line of descendants is, therefore, diversified in each family."

In Black's Law Dict., 359, it is said:

"One who is descended from another; a person who proceeds from the body of another, such as a child, grandchild, etc., to the remotest degree. The term is the opposite of 'ascendant.' Descendants is a good term of description in a will, and includes all who proceed from the body of the person named; as grandchildren and great-grandchildren. Amb. 397; 2 Hil. Real. Prop., 242."

In Van Beuren *vs.* Dash, 30 N. Y., 393, 418, 422, Denio, C. J., said:

"It can not for a moment be maintained, that, according to the common use of the word descendants, it is not limited to such persons as

proceed mediately or immediately from the body of the person of whom it is predicated, in the course of generation. . . . If we turn to the chapter of Blackstone's Commentaries, in which he treats of title by descent, we shall find the word descendant constantly used to denote the issue, mediate or immediate, of the person of whom those descendants are predicated, and never in a sense which would include collateral relatives. . . . Thus, we speak of the descendants of Abraham, of William the Conqueror, of George the Third, and of the first and second President Adams, of Jefferson and Alexander Hamilton; while we say of Queen Elizabeth, of William of Orange, of Washington and Madison, that they left no descendants, or, in the words of the statute, that they respectively died, leaving no child or other descendant. These are common forms of speech, and the meaning is perfectly definite, and it is such as I have mentioned. The word is invariably employed in that sense, in books of history, in memoirs, in biographies, in works on genealogy, and in almost every book which treats of men and their affairs. . . . The word descendants has reference to genealogy, or the succession of persons in the family relation, and has no necessary connection with the laws of inheritance. Land descends, in certain cases, from a son to his father, and from a man to his brothers, but this does not prove that the father is the descendant of his son, or the brother of his brother, in any possible sense."

In Bates *vs.* Gillett, 132 Ill., 287, 297, 24 N. E. Rep., 611, 612, it was said:

"A descendant is a person who is descended from another; that is, one who proceeds from the body of another, however remotely. The word is the converse or opposite of 'ascendant.' Amer. & Eng. Cyclop. Law, tit. 'Descendant.' 'Descendants' includes every person descended from the stock referred to. It is coextensive with 'issue,' but

does not embrace others not of issue. It is not to be understood as meaning 'next of kin' or 'heirs at law,' for these phrases comprehend persons in the ascending as well as the descending line, and may also include collaterals; but it does mean the issue of the body of the person named, of every degree, such as children, grandchildren, and great-grandchildren, and all others in the direct descending line. Hamlin *vs.* Osgood, 1 Redf. Sur., 409. And, when the term 'descendant' is used in a will, it means only lineal heirs—those in the direct descending line from the person named—unless there is a clear indication of intention on the part of the testator to enlarge its meaning. Parstow *vs.* Goodwin, 2 Bradf. Sur., 413; Baker *vs.* Baker, 8 Gray, 101–119; Walker *vs.* Walker, 25 Ga., 420. And so it has been held that 'descendant' is a good term of description in a will, and includes all who proceed from the body of the person named to the remotest degree. Crossly *vs.* Clare, 1 Amb., 396. See Jewell *vs.* Jewell, 28 Cal., 236. And this is the ordinary meaning applied to the word 'descendants' not only by the profession, but by the laity."

In Hillen *vs.* Iselin, 144 N. Y., 365, 374, 39 N. E. Rep., 368, 371, it was said:

"The learned counsel for the appellant has shown that the word 'descendant,' according to its accurate lexicographical and legal meaning, designates the issue of a deceased person, and does not describe the child of a parent who is still living. The word is the correlative of 'ancestor.' The word 'issue' is a word of broader import, and may include the children of a living parent as well as the children or descendants of one who is dead. But in an accurate sense one can not have a living ancestor, nor can a living person, although he may have children, have descendants."

In Tichenor *vs.* Brewer, 98 Ky., 349, 352, 33 S. W. Rep., 86, 87, it was said:

> "Plaintiffs confuse their claim as descendants and heirs at law. While it may be that the same persons are often both the descendants and heirs at law of an ancestor, yet it by no means follows that the terms 'descendants' and 'heirs at law' mean always one and the same person. . . . So far from Bettie Tichenor being the descendant of Frederick Brewer, she is his mother and he is her descendant. To say otherwise is but to utterly ignore the meaning of the word 'descendant' as defined by the best authors. Mr. Webster says 'descendant' means 'one who descends, as offspring, however remotely, correlative to ancestor or ascendant.' Mr. Stormouth: 'Any one proceeding from an ancestor; offspring.' Rapalje and Lawrence's Law Dictionary says 'descendant' means 'issue of the body of the person named, of every degree.' Again they say, 'it does not mean collateral relations.' Mr. Bouvier says 'descendant' means 'those who have issued from an individual, including his children, grandchildren, and their children, to the remotest generation.'"

In Waldron *vs.* Taylor, 52 W. Va., 284, 289, 45 S. E. Rep., 336, 338, 339, it was said:

> "Evidently the word 'children,' used in its common and ordinary sense, was deemed by the legislature not broad enough to include grandchildren and more remote descendants; hence the change of words from 'children' to 'descendants.' The same authority defines 'descendants' as 'those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree.' Ambl., 327; 2 Bro., Ch. 30, 230; 1 Roper, Leg., 115; A. & E. E. of L. (2d. Ed.), 399, gives the definition of descendant: 'A person who is descended from another. Any one who proceeds from the body of another, however remotely, is a descendant of the

latter. The word is the converse or opposite of 'ascendant' rather than of 'ancestor.' Taking all these words in the legal technical sense 'descendants' can not be construed to include any but lineal heirs without clear indication of a contrary intention. Thus the term does not include collateral relations nor ancestors.' Page on Wills, sec. 527, says: 'A descendant is one who descends as offspring, however remotely; correlative to ancestor or ascendant. The term includes the most remote lineal offspring, and is practically synonymous with "issue" in its legal meaning; hence it excludes collateral relations; nor does it include relatives in the ascending line.' In Baker *vs.* Baker, 8 Gray 101, it is held: 'The word "descendants" in a will can not be construed to include any but lineal heirs without clear indications in the will of the testator of his intention to extend it.' And in Armstrong *vs.* Moran, 1 Bradf. Sur. 314: 'A legacy to a sister's child is not a legacy to a descendant of the testator's. By "descendant" is not meant any relative to whom in some possible contingency property might descend, but lineal descendants, issue of the body.' In Tichenor *vs.* Brewer's Ex'r., 98 Ky., 349, 33 S. W., 86, 'The word "descendants" does not embrace collateral relations;' citing Rapalje & L. Dict.; Van Beuren *vs.* Dash, 30 N. Y., 393, and Bouv. L. Dict. In Bates *vs.* Gillett, 132 Ill., 287, 24 N. E., 611, it is held: 'Children are eo nomine descendants, but the latter are not necessarily children. A descendant is one who proceeds from the body of another, however remotely. The word is coextensive with "issue" but does not embrace others not of issue. It does not embrace next of kin or heirs at law, for these phrases comprehend persons in the ascending line, and may also include collaterals. When the word "descendant" is used in a will, it means only lineal heirs in the direct descending line from the person named, unless there is a clear indication of intention on the part of

the testator to enlarge its meaning. It is a good term of description in a will.' Evidently the purpose of the legislature in changing from 'children' to 'descendants' was to so far enlarge the term as to clearly include grandchildren and more remote issue. If it had been the intention to have made it still more comprehensive, so as to include all the heirs at law of the intestate, it would have been so expressed in the statute by inserting after the word 'descendant' in section 13 of chapter 78, the words 'or heirs at law,' or other words indicating the intention of the legislature to extend it beyond the issue of the intestate, and to include collateral relatives. When the words of the statute are not ambiguous, but have a clear and definite meaning, it is not within the province of this court to go further and amend the law by extending the provisions of it to include persons who are clearly excluded by the statute itself. In Hamlin *vs.* Osgood, 1 Redf. Sur., 409, it is held: 'Brothers and sisters can not take under the term 'descendants.' The term does not mean next of kin or heirs at law generally, but it means the issue of the body of the person named of every degree; as children, grandchildren, and great-grandchildren.'"

In Levering *vs.* Orrick, 97 Md., 139, 54 Atl. Rep., 620, 622, 623, it was said:

"In Williams on Executors, vol. 2 (7th Am. Ed.), p. *976, under the word 'descendants,' it is said: 'Under this description is comprised every individual proceeding from the stock or family referred to by the testator.' In 2 Jarman on Wills, 632: 'Descendants are issue of every degree.' . . . But here there is no such conflict of intent, and the predominant idea is that of ultimate bounty to 'descendants,' which words, as was said in Ralph *vs.* Carrick, 11 Ch. Div., 873, is less flexible than 'issue,' and requires a stronger context to restrict its meaning. . . . In Baker *vs.* Baker, 8 Gray, 121, the court tersely said, in deciding a similar case: 'Descendants are all those

persons answering the description at the time fixed by the will for distribution,' and therefore held posthumous children to be included."

There is, however, a difference between the words "descendants" and "heirs." Thus, in a note to 15 A. and E. Ency. L., 319, it is said:

"In Tichenor *vs.* Brewer, 98 Ky., 349, it was said: 'While it may be that the same persons are often both the descendants and heirs at law of an ancestor, yet it by no means follows that the terms "descendants" and "heirs at law" mean always one and the same person.' . . . But 'heirs' is sometime used in the sense of descendants. Maguire *vs.* Moore, 108 Mo., 267; Canfield *vs.* Fallon (Supm. Ct. Spec. T.), 26 Misc. (N. Y.), 345. And so of 'heirs of the body.' Tucker *vs.* Adams, 14 Ga., 548."

At page 329, it is said:

"A widow is not heir to her deceased husband, nor is a widower heir to his deceased wife, within the ordinary meaning of the term."

At page 330, note:

"In the following cases the husband was held not to be the heir of his deceased wife. Matter of Walton, 8 De G. M. & G., 174; Mason *vs.* Baily, 6 Del. Ch., 129; Buck *vs.* Paine, 75 Me., 582; Wilkins *vs.* Ordway, 59 N. H., 382; Wright *vs.* Methodist Episcopal Church, Hoffm. (N. Y.), 202; Roland *vs.* Miller, 100 Pa. St., 47."

An adopted child may or may not be an heir. Thus, where used by one who was not the adopting parent, it is not construed to include an adopted child. So in Wyeth *vs.* Stone, 144 Mass., 441, 11 N. E. Rep., 729, 732, it was said:

"Inasmuch as the testator is not the adopting parent, the burden is upon the tenant to show that it was the intention of the testator to include an adopted child."

Likewise where the words are "lawful heirs." Morrison *vs.* Sessions, 70 Mich., 297, 38 N. W. Rep., 249.

In Bates *vs.* Gillett, 132 Ill., 297, 24 N. E. Rep., 611, it was said:

> "Descendants include every person descended from the stock referred to. It is coextensive with 'issue,' but does not embrace others not of issue. It is not to be understood as meaning next of kin or heirs-at-law, for those persons comprehend persons in the ascending as well as the descending line, and may also include collaterals."

In the note to 9 A. & E. Enc. Law (2d Ed.), 399, it is said:

> "Brothers and sisters can not take under the term descendants. That word does not mean next of kin or heirs-at-law generally, as these phrases comprehend persons in the ascending as well as in the descending line and collaterals; but it means the issue of the body of the person named of every degree, such as children, grandchildren, and great-grandchildren. Hamlin *vs.* Osgood, 1 Redf. (N. Y.), 409."

5. Understanding of the Government Officers of the Title to be Conveyed by Article 2, of the Treaty of 1830, as Shown by the Patent.

(*a*) By article 2 of the treaty of September 27, 1830, there was contemplated a special grant of which Mr. Justice Harlan (U. S. *vs.* Choctaw Nation, 179 U. S., 494, 508, 45 L. Ed., 291, 297) observed:

> "It can not be doubted that the purpose of article 2 of the treaty of 1830 was to provide for a special grant to the Choctaws of the lands intended to be ceded to them by article 2 of the treaty of 1820, and no others."

(b) *By the Patent a Fee Simple Title Passed.*

The patent, after specifically mentioning that the conveyance is made pursuant to article 2 of the treaty of September 27, 1830, recites:

> "Now, Know Ye, That the United States of America in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation, the aforesaid 'tract of country west of the Mississippi,' to have and to hold the same, with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, *as intended to be conveyed* by the aforesaid article, '*in fee simple to them and their descendants, to inure to them*' while they shall exist as a nation and live on it."

As heretofore stated the words, "to inure to them while they shall exist as a nation and live on it" were intended to and did relate only to the life of the trust, and could not have reduced the estate to less than a fee. In New York Indians *vs.* United States, 170 U. S., p. 20, 42 L. Ed., p. 934, the court in determining the nature of the title acquired by the Indians under a treaty which provided for a grant, "**in fee simple,**" and in the habendum clause, "**provided always that such lands shall revert to the United States if the Indians become extinct or abandon same,**" said:

> "The object of the habendum clause is said to be 'to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use.' Sheppard's Touchstone, 75. It may explain, enlarge, or qualify, but can not contradict or defeat, the estate granted by the premises, and where the

grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the habendum performs the office of defining, qualifying, or controlling it. Jones, Real Prop., 563; Devlin, Deeds, 215.

"In this case if the habendum clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and habendum clauses. Admitting that the former, if standing alone, would engender a doubt as to when the grant should take effect, the habendum clause removes that doubt and imports a present surrender of a defined tract."

In Leavenworth, etc., R. Co. *vs.* U. S., 92 U. S., 733, 23 L. Ed., 637, Mr. Justice Davis said:

"'There be and is hereby granted' are words of absolute donation and import a grant in præsenti. This court has held that they can have no other meaning. They vest a present title."

The same doctrine is laid down in—

N. Y. Indians *vs.* United States, 170 U. S., 17, 42 L. Ed., 927, 933.

Missouri, etc., R. R. Co. *vs.* K. P. R. Co., 97 U. S., 491, 24 L. Ed., 1097.

St. Joseph, etc., R. Co. *vs.* Baldwin, 103 U. S., 427, 26 L. Ed., 579.

(c) *The Words "as Intended to be Conveyed," Appearing in the Patent, and the Words "in Fee Simple to Them and Their Descendants, to Inure to Them While They Shall Exist as a Nation and Live on It" Created a Trust.*

In this patent, issued twelve years after the treaty of 1830, we find the Government's understanding and construction of article two. Whatever else may be said, it

can not be pretended that the Government is not bound by the ordinary rules governing the construction and interpretation of this instrument. Here we find a patent prepared under the direction and bearing the signature of one of the foremost members of the American bar, Daniel Webster, then Secretary of State, passing a fee simple title and limiting the beneficial or equitable rights in the property exclusively "to them and their descendants." The words "*as intended to be conveyed in fee simple to them and their descendants*" and the word "inure" (meaning to serve to the use and benefit of) have always been held sufficient to fasten a trust upon the conscience of the trust donee. In Randolph *vs.* East Birmingham Lamp Co., 104 Ala., 355, 16 So. Rep., 126, Judge Haralson said:

> "In all cases, as has been held, **powers or trusts must be construed according to the intention of the parties, to be gathered from the whole instrument** (1 Perry on Trusts, sec. 248; Kerr *vs.* Verner, 66 Pa. St., 326; Guion *vs.* Pickett, 42 Miss., 77). And when a gift in a will or deed is expressed to be for the **'use and benefit'** of another or to be at the disposal of the donee, 'for himself and children' or 'toward his support and family,' or 'to enable the donee to provide for and maintain' his children, or where the gift is expressed to be made 'to the end' or **'to the intent'** that the donee should apply it to certain purposes, the terms thus employed have been held sufficient to fasten a trust upon the conscience of the trust donee (Hill on Trustees, 66, 67)."

The Choctaw Nation having been previously repeatedly recognized by the United States Government as fully possessed of authority to take and hold, in its own name, and for its own use, real or personal property, and to sell, alienate, or otherwise dispose of same, and pass a valid title thereto, and being specially recognized

as possessing such powers by the second and third articles of the treaty of 1830, there can be no question as to its authority to hold the property conveyed as **trustee.**

In Commissioners of the Sinking Fund *vs.* Walker, 6 How. (Miss.), 143, 38 Amer. Dec., 435, Chief Justice Sharkey said:

> "Before the statute of uses, 27 Hen. VIII, c. 10, there was a limitation or restriction as to those who could stand seized to uses, but since the passage of that statute trusts have been adopted to supply the place of uses, and the former inability to stand seized to a use no longer prevails. The general rule now is that all persons capable of confidence, and of holding real or personal property, may hold as trustees. **Corporations may now hold as trustees**, although they could not be seized to a use before the statute (Willis on Trustees, 32–38, L. Lib., ...). . . . A trust is said to be 'an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence' (Willis on Trustees, 2). To constitute a direct trust there must be a conveyance or transfer to a person capable of holding it; there must also be an object or fund transferred, and a cestui que trust or purpose to which the trust fund is to be applied. **No particular words are necessary to constitute a trust; but if it be the plain intention of the parties to create a trust, it will be regarded as such.**"

In Estate of Smith (144 Pa. St., 428, 22 Atl. Rep., 916), Judge Clark says:

> "**There is no certain form required in the creation of a trust.** . . . If the declaration be in writing, it is not essential, as a general rule, **that it should be in any particular form. It may be couched in any language which is sufficiently expressive of the intention to create a trust.** 'Three things, it has been said, must concur to raise a trust; sufficient words to create it, a definite subject, and a cer-

tain or ascertained object; and to these requisites may be added another, viz, that the terms of the trust should be sufficiently declared.' Bispham's Equity, 65, citing Cruwys *vs.* Colman, 9 Ves., 323; Knight *vs.* Boughton, 11 Clark, & F., 513. . . . The intention must be plainly manifest, and not derived from loose and equivocal expressions of parties, made at different times, and upon different occasions; but any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing.

"It is not necessary that the terms 'trust' and 'trustee' should be used. The donor need not say in so many words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. Richards *vs.* Delbridge, supra. In Heartley *vs.* Nicholson, supra, Vice-Chancellor Bacon says: 'It is not necessary that the declaration of a trust should be in terms explicit, but what I take the law to require is, that the donor should have evinced by his acts, which admit of no other interpretation, that he himself had ceased to be, and that some other person had become the beneficial owner of the subject of the gift or transfer, and that such legal right of it, if any, as he retained was held in trust for the donee.' 'The one thing necessary,' says the same learned judge in Warriner *vs.* Rogers, supra, 'to give validity to a declaration of trust—the indispensable thing—I take to be that the donor or grantor, or whatever he may be called, **should have absolutely parted with that interest which had been his up to the time of the declaration; should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest.**' The acts or words relied upon must be unequivocal, plainly implying that the person holds the property as trustee. Martin *vs.* Funk, 75 N. Y., 134, 31 Am. Rep., 446. . . ."

The trust created was not only for the use and benefit of those persons then in esse, and members of the Choctaw community in 1830, but equally for the use and benefit of "descendants" yet unborn. It is not necessary that the cestui que trust should be in existence in order to create a trust estate. The designation of a trustee capable of taking the legal title to the land and the designation of a person or class of persons, for whose benefit the trust was created was sufficient. In Salem Capital Flour Mills Co. *vs.* Stayton Water Ditch and Canal Company, 33 Fed. Rep., 146, 153. Judge Deady said:

> "The natural persons constituting this association, partnership, or company, and calling themselves collectively the 'Wallamet Woolen Manufacturing Company,' were in existence at the date of the deed, and capable of taking the beneficiary interest in the grant. **The description of them as stockholders in a certain 'joint stock company,' was a sufficient designation of them.** Friedman *vs.* Goodwin, McAll., 149. But if this were otherwise, and **there was no cestui que trust or use in existence at the date of the deed,** nor until the actual incorporation of the woolen company in the December following, **the objection is not well taken.** Mr. Washburn (2 Washb. Real Prop., 3d Ed., 173), after a careful review of the authorities says: **'It may be laid down as a general proposition that it is not necessary in order to create a trust estate that a cestui que trust should be named who is in being.'** And again (Id., 198) he says: **'A trust may be valid and effectual, where a trustee is named, although the cestui que trust may not then be in esse, provided such cestui que trust subsequently came into being.'"**

See, also, on this point—

Ashhurst *vs.* Given, 5 Watts & S., 328.
Urket *vs.* Coryell, Id., 50.

In Herrmans *vs.* Schmaltz (7 Fed. Rep., 566, 573, 574), Judge Dyer said:

> "As to all the beneficiaries named in the supplementary instrument, there can be no doubt that the trust is sufficiently expressed and defined. But it is claimed that the persons who are to take under the second clause of the instrument, and those who are to receive property under the residuary clause in case any of the persons named therein die before the decease of the grantor, should have been designated by name, and that this omission leaves the trusts so far unexpressed and undefined as to invalidate the instrument as a conveyance in trust. I am unable to concur in that view. Most of the ultimate recipients of the property are named, and the proportions they are to receive are stated. The trusts are all clearly defined. In the two instances in which it is provided that distribution shall be made among the children of certain persons, there is designation of **a class of beneficiaries.** The grantor in such a case could not know when the trust is created, who of the class whom he desired to share in his property might be living at his death, or the names of such persons, or whether there would be children of some other beneficiary named surviving him; and I do not think it is the meaning or intention of the statute that the failure to name in every instance the person whom he might desire in certain contingencies to ultimately share in his estate. **The class in which such person would belong being specifically designated,** should be held to defeat the conveyance as a valid trust instrument, on the ground that it does not fully express and clearly define the trust; and, on the whole, I am of the opinion that by the instruments in question an active trust, valid under the statute, was created, and that the plaintiff was made the trustee of an express trust, clothed with the legal title to the premises in controversy."

6. Similar Grants to Other Indians and Judicial Construction thereof, With Their Application to the Present Case.

(*a*) Treaties made with other Indian tribes clearly show the error of the trial court in holding that it was the *unbroken* policy of the Government to make grants of land to the Indian nation or tribe without limitation to any particular class of individuals.

On January 15, 1838, less than seven years after the treaty with the Choctaws was proclaimed, and within one year after the Chickasaws were permitted to participate therein, the Government entered into a treaty with the Six Nations of New York Indians (7 Stat. L., 550), by the first article of which the Indians "hereby cede and relinquish to the United States all their right, title, and interest to" certain lands therein described.

Article 2 provided:

> "The United States agree to set apart the following tract of country . . . to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes or nations of Indians by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled 'An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi.'"

Article 3 provided:

> "It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the

President may from time to time appoint, shall forfeit all interest in the land so set apart, to the United States."

The Indians never removed. The Government shortly after 1860 appropriated the land, contending that the grant was not *in præsenti* and that the Indians had forfeited all claims thereto by not complying with article 3 and removing. Out of this arose New York Indians *vs.* U. S., 170 U. S., 1, 42 L. Ed., 927, one of the cases relied upon by appellants. This court held that the grant was *in præsenti* to the *individuals* enumerated in the schedule showing the members of the tribes at the time the treaty was signed. In the opinion of Mr. Justice Brown previous grants to Indians were reviewed at length, and it was held that the words "agree to set apart," "shall be alloted for, and given to," "shall have their right to," "shall be laid off for," "there be and is hereby granted," "shall be and are hereby granted," and other words of similar import constituted grants *in præsenti*.

The grant to the New York Indians was *en bloc* upon a basis of 320 acres of land to each individual. The grant to the Choctaws was *en bloc*, the acreage to each individual not being designated, but, as stated by the Secretary of War, it was "sufficient for all your wants, and when you are gone for the wants of your children." (Sen. Doc., 512, vol. 2, p. 245, 23rd Cong., 1st Sess.) When the Chickasaws acquired by purchase an interest in the Choctaw lands, it was upon a basis of 800 acres to each soul. (Sen. Doc., 512, vol. 2, p. 274.)

(*b*) There is no doubt that the Choctaws by the third article of the treaty of 1830 made an absolute, unconditional, and immediate surrender of all their title to lands east of the Mississippi to the Government of the United States, and it is unreasonable to assume that they expected or intended that the conveyance to them

of the lands west of the Mississippi should be anything less than a fee simple. The language used in the treaty clearly imports that an immediate and irrevocable grant shall be made to the Choctaws. So in New York Indians *vs.* U. S., 170 U. S., 1, 42 L. Ed., 927, 933, 934, Mr. Justice Brown said:

> "There is no doubt that the cession by the Indians of their interest in the Wisconsin lands in the first article of the treaty, was an absolute, unconditional, and immediate grant, and it is improbable that the Indians would have consented, or that the United States would desire that they should accept from the Government a mere promise to set apart for them in the future the tract in Kansas. If we are to adopt such a construction it would follow that the title of the Indians, not only to the tract in Kansas, but to the lands in Wisconsin was made dependent upon their removal to their new home. While it might be reasonably contended that their failure to remove should result in a cancellation of the treaty and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands and puts it beyond their power to revoke the bargain. . . ."

(*c*) In Jones *vs.* Meehan, 175 U. S., 1, 44 L. Ed., 49, 58, this court again elaborately reviewed other grants in fee theretofore made to Indians, and held that certain words of grant used in the treaty before the court constituted grants in fee, Mr. Justice Gray (p. 21) among other things saying:

> "The clear result of this series of decisions is that when the United States in a treaty with an Indian tribe and as a part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified num-

> ber of sections of land, either already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple, and that title is alienable by the grantee at his pleasure, unless the United States by a provision of the treaty or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

This view was recently emphasized by the Circuit Court of Appeals for the Eighth Circuit (Shulthis *vs.* McDougal, 170 Fed. Rep., 529).

Treaty of 1837.

The negotiations heretofore set out culminated in the Choctaws and Chickasaws entering into a treaty on the 17th day of January, 1837, which was ratified by the Senate and proclaimed as a law on March 24, 1837 (11 Stat. L., 573), by the first article of which it was "agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their (Choctaw) country **to be held on the same terms that the Choctaws now hold it,** except the right of disposing of it (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Choctaw Nation."

By the second article the boundaries of the Choctaw and Chickasaw districts were established.

By the third article the Chickasaws agreed to pay the Choctaws $530,000 for the rights secured to the Chickasaws.

The fourth article provided for the adjustment of differences that might arise between the Choctaws and Chickasaws.

The fifth article provided:

> "It is hereby declared to be the intention of the parties hereto that equal rights and privileges shall pertain to both Choctaws and Chickasaws to settle in whatever district they may think proper, and to be eligible to all the different offices of the Choctaw nation, and to vote on the same terms in whatever district they may settle, except that the Choctaws are not to vote in anywise for officers in relation to the residue of the Chickasaw fund."

It will be observed that this treaty was negotiated by the representatives of the Choctaw and Chickasaw people, and, as stated in article one, it was the "Choctaws," not the "Choctaw Nation," that made the cession, and the "Chickasaws," not the "Chickasaw Nation," to whom the cession was made. The land was to be held in common by the Choctaws and Chickasaws, with equal rights accorded to both to settle on any portion of their common property.

7. The Treaties of 1855 and 1866, as Indicative of the Intention of the Parties in Making the Treaty of 1830.

(a) *View of the Court Below.*

The court below was of the opinion that the treaties of 1855 and 1866 showed that there was no intention by the treaty of 1830 to vest any individual rights because the learned judge (Rec., p. 34) said:

> "In 1855, after twenty years or more of residence in the Indian Territory, the Choctaws and Chickasaws entered into another treaty with the United States (Kappler's Laws and Treaties, 2d Ed., vol. 2, 706), in the preamble of which it was stated, as one of the purposes, that 'it is necessary for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting

treaty stipulations be embodied in one comprehensive instrument.' In Article I of this treaty is the following provisions: 'And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same.' Here is a treaty not purporting to change any existing treaty stipulations, but the purpose of which is to embody them in one comprehensive instrument. It then proceeds to guarantee the lands of the tribes not to the original members of 1842 and their descendants, but to the then present membership, their descendants and successors, so that each member of the tribe shall share in its lands. In 1866, eleven years later, still another treaty was entered into, in which is incorporated a plan for a division of the lands in severalty. In Article XI of this treaty, it is recited that 'the land occupied by the Choctaw and Chickasaw nations and described in the treaty between the United States and said nations of June 22, 1855, is now held by *the members* of said nation in common, under the provisions of said treaty.'"

(b) *No Action in 1855 or 1866 Could Affect Rights Vested in 1830.*

Of course, if the treaties of 1830 and 1837 did vest any right, no action thereafter could affect the rights of those who are within the meaning of that treaty "descendants" of the then members of the nations. In other words, the obligations of a contract existing by

virtue of the treaties of 1830 and 1837 could not be impaired by any subsequent action. We turn, then, to these treaties to see if undue weight should be given thereto.

(c) *Treaty With the Choctaws and Chickasaws, 1855.*

This treaty (11 Stat. L., 611) in article 1 provided:

> "And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the *members* of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

Here is language which recognized that title was guaranteed to the *members* as distinguished from the nations, so that *"each and every member" shall have an equal undivided interest in the whole.* That this language was clearly sufficient to vest a title is beyond all doubt (New York Indians *vs.* U. S., 170 U. S., 1, 42 L. Ed., 927; Jones *vs.* Meehan, 175 U. S., 1). Yet it was only used as recognizing that which already existed. Undue stress was by the court below placed upon the use of the words "heirs and successors" instead of "their descendants." In the original draft of the treaty, as heretofore shown, the Choctaws used the words "their descendants and citizens," while President Jackson insisted upon using only the words "their descendants." It is hardly to be supposed that a clause *confirming* a prior grant used the words "heirs and

successors" differently from "descendants." While the latter is a broader word, yet they could be used interchangeably.

In 13 Cyc., 1049, it is said:

> "In Huston *vs.* Read, 32 N. J Eq., 591, the court said: 'The legacies given to her (a devisee under a will) by the first and fourth sections also lapsed. The substitutionary words in the first are the same—"descendants"—and though, in the fourth, they are "heirs and descendants," the meaning of the testator was the same; the words "heirs" and "descendants" were used synonymously, and he meant lineal descendants.'"

In 15 A. & E. Ency. Law (2d Ed.), 318, 319, it is said:

> "In Tichenor *vs.* Brewer, 98 Ky., 349, it was said: 'While it may be that the same persons are often both the descendants and heirs at law of an ancestor, yet it by no means follows that the terms "descendants" and "heirs at law" mean always one and the same person.' . . . But 'heirs' is sometimes used in the sense of descendants. Maguire *vs.* Moore, 108 Mo., 267; Canfield *vs.* Fallon (Supm. Ct. Spec. T.), 26 Misc. (N. Y.), 345. And so of 'heirs of the body.' Tucker *vs.* Adams, 14 Ga., 548."

So the word "successor" (27 A. & E. Enc. L., 2d. Ed., 360) "implies one who takes a place that another has left."

As construction should favor legality, it is only fair to say the "heirs and successors" mentioned in the treaty of 1855 were the "descendants" provided for in the treaty of 1830. Such a construction is fair when it is manifest that it was not in 1855 the intention to take away rights, but to confirm those already in existence.

(d) *Under the Treaty of 1855 Rights Were Vested.*

Even if the estate vested in 1830 in "descendants" was in 1855 carved down to heirs and successors, still

the latter were given a vested interest. Wherefore the appellants being *descendants* were also necessarily heirs and successors. There was, therefore, no right to exclude them from participation. Hence if the treaty of 1855 were the sole muniment of title, appellants have a case.

(e) ***Nothing in the Treaty of 1855 Indicating That Title Existed in the Nation to the Exclusion of the Individual.***

But passing by all that has been said, there is no reason for the suggestion that it was, as held below, intended by the treaty of 1855 to make *tribal* membership by blood, adoption and intermarriage, as recognized and conferred by the tribal officials from time to time any test. The preamble of the treaty of June 2, 1855 (11 Stat. L., 611), states the objects for which the treaty was negotiated to be:

> "WHEREAS, The political connection heretofore existing between the Choctaw and Chickasaw tribes of Indians has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and,
>
> "WHEREAS, The United States desire that the Choctaw Indians shall relinquish all claim to any territory west of the one hundredth degree of west longitude, and also to make provisions for the permanent settlement within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reasonable terms, to the United States that portion of their common territory which is west of the ninety-eighth degree of west longitude; and,
>
> "WHEREAS, the Choctaws contend, that, by a just and fair construction of the treaty of September 27, 1830, they are, of right, entitled to the net proceeds of the lands ceded by them to the United States, under said treaty, and have

> proposed that the question of their right to the same, together with the whole subject-matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said treaty, shall be referred to the Senate of the United States for final adjudication and adjustment, and whereas, it is necessary for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied in one comprehensive instrument."

It will bear repeating to again set forth article 1.

> "The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country. . . .
>
> "And pursuant to an act of Congress approved May 28th, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the **members** of the Choctaw and Chickasaw Tribes, their heirs and successors, to be **held in common;** so that each and every member of either tribe shall have an equal undivided **interest in the whole:** Provided, however, no part thereof shall ever be sold without the consent of both tribes and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

The court below (Rec., p. 34) thought this article was adopted "for the simplification and better understanding of the relations between the United States and the Choctaw Indians" (see preamble) and that by this article only "members of the tribes, their heirs and successors," were to share in the property, and then only such as were actually recognized as members at the time of the dissolution.

This view is clearly erroneous. The differences existing between the Government and the Choctaws, referred

to in the preamble, arose, not over the title by which the Choctaws and Chickasaws held the land, specially granted by the patent issued in 1842, but over the proceeds derived from the sale of their eastern lands in Mississippi conveyed by the treaty of 1830, as shown by articles eleven and twelve of this treaty. Article eleven provides:

> "The Government of the United States, not being prepared to assent to the claim set up under the treaty of September the twenty-seventh, eighteen hundred and thirty, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw people, and being desirous that their rights and claims against the United States shall receive a just, fair, and liberal consideration, it is therefore stipulated that *the following questions* be submitted for adjudication to the Senate of the United States:
>
> "First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States, by the treaty of September the twenty-seventh, eighteen hundred and thirty, deducting therefrom the cost of their survey and sale, and all just and proper expenditures and payments under the provisions of said treaty; and if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected? Or,
>
> "Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims national and individual against the United States; and, if so, how much?"

Article twelve provides:

> "In case the Senate shall award to the Choctaws the net proceeds of the lands, ceded as aforesaid,

> the same shall be received by them in full satisfaction of all their claims against the United States, whether national or *individual*, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such *individual* claims as may be adjudged by the proper authorities of the tribe to be equitable and just, the settlement and payment to be made with the advice and under the direction of the United States agent for the tribe; and so much of the fund, awarded by the Senate to the Choctaws, as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the tribe, shall on their requisition be paid over to them by the United States. But should the Senate allow a gross sum in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for, and bound to pay, all the individual claims as aforesaid, it being expressly understood that the adjudication and decision of the Senate shall be final."

There was no suggestion of an intention to limit property rights to such persons as the tribal officials saw fit to recognize as "members of the tribes, their heirs and successors," even if they could have done so under the special grant of 1842 conveying the property "to them and their *descendants*."

Article two of the treaty of 1830 provided for a special grant for the exclusive benefit of "them and their descendants." It being expressly stated in the grant that such was its purpose, it is fair to infer, as already shown, that the contracting parties to this treaty intended that membership in the tribes should be confined to the designated class of "them and their descendants" mentioned in the treaty of 1830, and the special grant made in 1842.

In United States *ex.* Heth, 3 Cranch, 399, 409, 2 L. Ed., pp. 479, 482, it was said:

> "Where it can be shown that the Government has once adopted a certain rule of justice for its conduct, it is fair to infer that in legislating afterwards upon the same subject it intended to pursue the same rule unless the contrary shall be clearly expressed."

The vice, in the view of the court, is emphasized in New York Indians *vs.* United States, 40 Ct. Claims, 448, 451, wherein the court said:

> "To accept as final the determination of such communities or societies, on the question of a legal right to participate in the fund would be an evasion of judicial duty. It would be committing individual rights to the incompetent hands of those who have a direct pecuniary interest in the decision. Neither can the court accept the action of any community subsequent to the date of the treaty as being a legal determination on the question of communal membership, and where it appears that since the execution of the treaty a communal roll has been tampered with and persons who were not Indians have been admitted to communal membership from improper motives and by arbitrary methods, the court will not regard them as beneficiaries under the treaty or as persons entitled to participate in the fund. . . . In determining who were the persons termed Indians within the intent of the treaty, the court must resort to the actual communities then existing, so far as they can be ascertained, and must carry out the obvious intent of the treaty without being limited by Indian laws or customs which would defeat its chief purpose. . . . Consequently, the court must adopt a rule of descent or participation which would embrace all persons whom it was the policy of the United States to remove and this rule being, ex necessitate rei, once established must continue.

"... This is not a question of Indian citizenship or tribal custom or communal ownership in Indian property, but simply a question of contract, of the subject-matter and purpose of a contract, and of the intent of those who entered into it. ... The court appreciates the work done by direction of the Secretary of the Interior, and regrets that there should be a difference of opinion as to the distribution of the fund; but for the reasons hereinbefore given, the court can not regard this as simply a distribution of Indian property by Indian methods according to Indian law and at the dictation of Indian communities. The court, acting judicially, must be controlled by the purpose of the treaty and the terms of the jurisdictional act. It can not exclude from rolls Indians who were or whose ancestors were parties to the treaty of Buffalo Creek, and it can not admit as beneficiaries Indians who were not parties to the treaty of Buffalo Creek and whose ancestors were not. Neither can the court uphold the unsatisfactory, if not fictitious, rolls which some of the parties have framed, nor can the court allow Indian law or custom or decision to determine who shall participate in the distribution of this fund and in effect decide who were persons intended to be removed from New York and Wisconsin to the country west of the Mississippi."

In U. S. *vs.* Choctaw Nation, 179 U. S., 494, 522, 45 L. Ed., 291, 300, 303, this court, in determining a controversy arising out of the treaty of 1866 (eleven years after the treaty of 1855 was ratified), held that the title of the Choctaws in that year was acquired by the patent issued in 1842, in pursuance of article 2 of the treaty of 1830, and the court attaches significance to the grant which it says was a special grant and became binding when accepted by the Choctaws.

The cession was made to the Choctaws under the

special treaty of 1830; the Chickasaws by the treaty of 1837 purchased an individual right in the common property of the Choctaws, equal to the individual holdings of the Choctaws; the Government having conveyed the land in fee simple by the patent issued in 1842 in pursuance with the treaty of 1830, therefore the act of Congress approved May 28, 1830, and referred to in the second paragraph of article one of this treaty had, and could have no bearing on the title to the lands in controversy. The paragraph in question in the treaty of 1855, if to be construed as it was below, was evidently inserted in the treaty through ignorance or carelessness of the Government officers who drafted the instrument, and is not in harmony with the purposes for which the treaty was negotiated, which were, namely, for the settlement of political differences between the Choctaws and Chickasaws, and the settlement of the claims against the Government of the United States. The words employed in this paragraph are without legal significance when applied to the common land of the Choctaws and Chickasaws.

In 15 A. & E. Enc. Law (2d Ed.), 318, the word "heir" is thus defined:

> "At common law an heir is he who is born or begotten in lawful wedlock, and upon whom the law casts an estate in lands, tenements and hereditaments, immediately upon the death of the ancestor."

Could the death of an ancestor "cast an estate" in common lands upon his "heirs," then members of these tribes, who acquired full right to participate in the tribal property by birth? As the ancestor acquired only a life interest in the usufruct of the land and as that right terminated with his demise, he never had an interest in the common lands possible of being transmitted to his "heirs." He enjoyed the fruits of his birthright during his life and his rights in the property

terminated instantaneously with his demise and passed back to the living beneficiaries under the grant.

It is reasonable to assume, therefore, that this provision was inserted by the Government officers who prepared the treaty in the belief that the cession was made under the act of Congress approved May 28, 1830.

It will be observed that this treaty was negotiated by the representatives of the Choctaws and Chickasaws, not the "nations," that by article nine, the "Choctaw Indians" cede and relinquish all their right, title and interest in, and to "the lands ceded;" that by the tenth article the United States is to pay to the "Choctaws and Chickasaws" the purchase price, and that by the thirteenth article, certain things therein designated are to be done by the United States for the "improvement, welfare, and happiness of the Choctaw people and their *descendants*."

(f) *Treaty of 1866.*

Undue emphasis was by the court below (Rec., p. 34) placed upon the treaty of 1866 (14 Stat. L., 769). This treaty was negotiated primarily for two purposes: First, to secure the cession by the Choctaws and Chickasaws of all their lands west of the 98th degree of west longitude; and, second to abolish slavery. The treaty, however, contained a provision for an immediate allotment in severalty of the common property of the Choctaws and Chickasaws, the extinction of the two tribal governments and the creation of one general government, which object was never effectuated. By the second article the "Choctaws and Chickasaws" agreed to cede certain of their lands and to the abolition of slavery.

The third article provided:

> "ART. 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98 deg. west longitude,

known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to, said nations respectively; and also to give to such persons, who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws, and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to, as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall

deem proper—the United States agreeing within ninety days from the expiration of the said two years to remove from said nations all such persons of African descent as may be willing to remove; those remainiag or returning after having been removed from said nations, to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

By this article only those *persons* of African descent and held in slavery at the *date* of the treaty of Fort Smith (September 15, 1865), and their *descendants* born *prior* to the ratification of this treaty were to be given all the "rights, privileges, and immunities, including the right of suffrage of citizens of said nations" provided the legislatures of the two nations adopted, within two years, laws, rules, and regulations conferring such rights upon said persons of African descent. Upon the adoption of said laws, rules, and regulations within two years from the ratification of this treaty, the United States agreed to place to the credit of the Choctaws and Chickasaws the sum of $300,000 to be held in trust and to bear interest at the rate of 6 per centum. No rights were conferred upon any person of African descent, born after the ratification of this treaty.

The Chickasaws never adopted said laws, rules, or regulations and never conferred any rights on their former slaves and their descendants.

United States *vs.* Choctaw Nation, 193 U. S., p. 115; 48 L. Ed., 640.

On May 21, 1883, fifteen years after the time prescribed in article three of the treaty in which said laws, rules, and regulations were to have been adopted, the Choctaw

council passed (Laws of C. N., 1894, 133), an act providing in part as follows:

> "BE IT ENACTED by the General Council of the Choctaw Nation assembled, That all persons of African descent, resident in the Choctaw Nation at the date of the treaty of Fort Smith, September 15, 1865, and their descendants formerly held in slavery by the Choctaws or Chickasaws, are hereby declared to be entitled to, and invested with all the rights, privileges, and immunities, including the rights of suffrage of citizens of the Choctaw Nation, *except in annuity moneys and the public domain of the nation.* . . .
>
> "BE IT FURTHER ENACTED, That intermarriage with such freedmen of African descent who were formerly held as slaves of the Choctaws, and have become citizens, shall not confer any rights of citizenship in this nation, and all freedmen who have married or who may hereafter marry, freedwomen who have become citizens of the Choctaw Nation are subject to the permit laws, and allowed to remain during good behavior only."

It will be observed that no property rights were conferred by this act of the Choctaw council; that only political rights were given "persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, September 15, 1865, and their descendants formerly held in slavery by the Choctaws or Chickasaws."

As neither the Choctaws nor the Chickasaws complied with the requirements of article three of the treaty of 1866, either in two years after its ratification or at any time thereafter, the only rights possessed by freedmen were in the said sum of $300,000, for this article provided:

> "And should the said laws, rules, and regulations not made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust

> for the said Choctaw and Chickasaw nations and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory, in such manner as the United States shall deem proper, the United States agreeing within ninety days from the expiration of the said two years to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

No rights were conferred upon any person of African descent by this law as it was not enacted within the requisite two-years period, and further because the treaty required joint action by the legislatures of the two nations, as the property in which rights were conferred was the joint property of the Choctaws and Chickasaws.

The fourth, fifth, sixth, and seventh articles of this treaty have no bearing on the issues in this case except that whenever a right is granted it is by the Choctaws and Chickasaws, not the nations.

The eighth and succeeding articles provide for an amalgamation of the two governments and the allotment of the land in severalty, which scheme was never effectuated.

The court below laid great stress upon the language used in article eleven as showing that both the Indians and the government intended that "membership" in the tribes at the time of this treaty as determined by the Indians, not "membership" on September 27, 1830, and "their descendants"—in accordance with the treaty of 1830 and the special grant—should be the test as to

property rights. Among other things, it was (Rec., p. 34) said:

> "In 1866, eleven years later, still another treaty was entered into, in which is incorporated a plan for a division of the lands in severalty. In Article XI of this treaty, it is recited that 'the land occupied by the Choctaw and Chickasaw nations and described in the treaty between the United States and said nations of June 22, 1855, is now held by the members of said nations in common, under the provisions of said treaty.'"

This construction is clearly erroneous. It was never the intention of the United States or the Indians to permit the Indian officials—pecuniarily interested in the estate—to say who were, and who were not, members of the tribes and thereby determine property rights. The words "members of the tribes" were clearly intended to embrace all that class of persons referred to in the treaty of 1830 and the special grant.

Preparatory to any allotments being made it was provided in the second paragraph of article eight "a census of each tribe" should be taken under the direction of the Superintendent of Indian Affairs, and it is no where stipulated that said census shall be confined to such persons as were recognized by the Indian officials as "members of the tribes."

By the dissolution of the Choctaw government created under the treaty of 1830, as provided for in this treaty, the trust would have terminated and the members of the *cestui que trust* could have divided the lands in severalty or conferred their individual interests upon the new government to be thereafter created. That the individual Indians were possessed of property rights is expressly stated in article 11 which, when properly construed, included only that class of persons designated in article 2 of the treaty of 1830 and the special grant made

in 1842, and further by article 43, which for the first time, in all the treaties and negotiations with these people, provided for the holding of the residue, or unallotted lands, by the Choctaw and Chickasaw nations in their corporate capacities.

As the scheme of government and allotment provided for in this treaty was never carried into effect, the Choctaws and Chickasaws continued to hold the common property under the treaty of 1830 and the special grant of 1842, and the provisions of the treaty of 1866 authorizing the nations to confer civil and political rights upon adopted and intermarried white citizens never became operative.

8. Looting of Estate by White and Mixed Breed Indian Officials and Action by Congress After Treaty of 1866 to Protect Rights of Lawful Beneficiaries.

After referring to the treaty of 1866 the court below (Rec., p. 35) said:

> "From this treaty down to the creation of the Dawes Commission, we find these Indians making membership in the tribe the test as to the interest in the tribal lands and property. . . ."

This statement emphasizes the false premises upon which the decision of the court below is predicated and the vice of its conclusions. It is true that the Indian officials, who had become wholly corrupt, did for their personal gain attempt to make "citizenship" or "membership in the tribes the test as to the interest in the tribal lands and property." Prior to 1896, the Indian governments became wholly corrupt and practically this entire estate was monopolized by a few avaricious white and mixed breed tribal officials for personal gain to the exclusion of the blood Indians. These officers did at-

tempt to make citizenship, as recognized and conferred only by them, the test as to political and property rights. And for this purpose citizenship was conferred at will by them for a consideration, and the blood Indian who had long enjoyed political and property rights in the tribes, was by them decitizenized at will without notice, trial or opportunity to be heard. Because of this very condition, the Government of the United States interfered and by legislation abolished the tribal governments and divested their corrupt tribal officials of any control over life, liberty or property within the borders of these nations, as is conclusively shown by the reports of the committees of the House and Senate, of the Dawes Commission and the legislation enacted by Congress.

The first law enacted was the act of March 1, 1889 (ch. 333, 25 Stat. L., 583–788 inc.). By this act a "United States court" was established in the Indian Territory with jurisdiction over all civil cases, arising between citizens of the United States, and over all criminal cases, where the offense was "against the laws of the United States."

As a result of an investigation conducted in 1889 by a select committee of the House of representatives, composed of William M. Springer, chairman, and Messrs. Mansur, Perkins, Peters and Allen, associate members (Sen. Doc. No. 182, 54th Cong., 1st Ses., 2) the act of May 2, 1890 (ch. 182, 26 Stat. L., 93–99 inc.), was passed. By this act the jurisdiction of the "United States District Court" was enlarged, certain laws of the State of Arkansas were extended over the Indian Territory, provision was made for the appointment of United States Commissioners with jurisdiction over certain civil and criminal cases and for the "naturalization" of the Indians. In order to remove any possible doubt as to the protection of the Federal Constitution over life, liberty and prop

erty within the Indian Territory, the following provision (sec. 31, 26 Stat. L., 96) was included :

> "The Constitution of the United States . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States."

Then followed the act of March 3, 1893 (ch. 209, 27 Stat. L., 645), section 16 of which provided:

> "The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, the Seminole Nation for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, *as may be entitled to the same*, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, *with a view to such an adjustment, upon the basis of justice and equity*, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

Proceeding under this authority the commission, as stated by A. S. McKennon, a member of the commission, at a hearing before the House Committee on Indian Affairs (Sen. Doc., 182, 54th Cong., 1st Ses., 4), represented to the Indians, under instructions from the Secretary of the Interior and the President:

> "We had our instructions, which this committee can see if they desire. Besides, the Secretary of the

Interior had said to us: 'You are going down there in the interest of the Indians; you are charged with the work of placing those people, if they negotiate with you, in the very best possible condition, in order that they may become good citizens of the United States and enjoy the property which belongs to them.' We ourselves went there in that kind of a spirit. The President had also made some such remark to us. We commenced to consider the matter in this way: This country belongs to these people, every foot of it; not an inch of it belongs to a white man within these territorial lines. If that be the case, then the Indian ought to enjoy his property—ought to govern the country. And the first proposition we made to these people, the first time we addressed them, was to establish an Indian government in which no one but the *Indian and his descendants* should have the right to vote, unless that right was conferred by the legislature. The legislature would, of course, be composed of Indians, and they would have had their affairs in their own hands."

Subsequently a committee of the Senate (Sen. Doc. No. 182, 54th Cong., 1st Ses., 2), consisting of Senators Butler, Perkins, and Higgins, investigated the affairs of the Five Civilized Tribes, which was followed (Sen. Rep. No. 377, 53d Cong., 2d Ses., 1) by the Senate on March 29, 1894, adopting a resolution directing the committee on the Five Civilized Tribes of Indians, or a sub-committee thereof to investigate fully the conditions existing in the Indian Territory and to report to the Senate thereon as well as what legislation in their opinion was desirable to correct the existing abuses.

Accordingly on May 7, 1894, the committee submitted in writing the result of its investigation and conclusions

(Sen. Rep. No. 377, 53d Cong., 2d Ses., pp. 11 and 12) in part as follows:

> "The theory of the Government was when it made title to the lands in the Indian Territory to the Indian tribes as bodies politic that the **title was held for all of the Indians of such tribe.** All were to be equal participators in the benefits derived from such holding. But we find in practise such is not the case. A few enterprising citizens of the tribe—frequently not Indians by blood, but by intermarriage—have, in fact, become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe, theoretically, for all; **yet in fact, the great body of the tribe derives no more benefit from their title than their neighbors in Kansas, Arkansas, or Missouri.**"
>
> "As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises what is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights. . . .
>
> "If the tribe fails to administer its trust property by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust.
>
> "Is it possible because the Government has lodged the title in the tribe in *trust* that it is without power to compel *the execution of the trust in accordance with the plain provisions of the treaty concerning such trust?*
>
> "Whatever power Congress possessed over the Indians as semi-dependent nations, or as persons

> within its jurisdiction, it still possesses; notwithstanding the several treaties may have stipulated that the Government would not exercise such power, and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes.
>
> "If the determination of the question whether the trust is or is not being properly executed is one for the courts and not for the legislative department of the Government, then Congress can provide by law how such question shall be determined and how such trust shall be administered if it is determined that it is not now being properly administered. . . ."

On November 20, 1894, the Commission to the Five Civilized Tribes submitted its report (Sen. Mis. Doc. No. 24, 53rd Cong., 3rd Ses., pp. 88, 89, 90, 91, 92) in which the following appears:

> "The barrier opposed at all times by those in authority in the tribes, and assuming to speak for them as to any change in existing conditions, is what they claim to be 'the treaty situation.' They mean by this term that the United States is under treaty obligations not to interfere in their internal policy, but has guaranteed to them self-government and absolute exclusion of white citizens from any abode among them; that the United States is bound to isolate them absolutely. It can not be doubted that this was substantially the original governing idea in establishing the Five Tribes in the Indian Territory, more or less clearly expressed in the *treaties, which are the basis of whatever title and authority they at present have in the possession of that Territory*, over which they now claim this exclusive jurisdiction. To that end the United States, in different treaties and patents executed in pursuance of such treaties, conveyed to the several tribes the country originally known as the 'Indian Territory," of which

their present possessions are a part only, and agreed to the establishment by them therein of governments of their own. The United States also agreed to exclude all white persons from their borders.

"These treaties, however, embraced stipulations equally clear, that these tribes were to hold this territory for the use and enjoyment of *all Indians belonging to their respective tribes*, so that every Indian, as is expressed in some of the treaties, 'shall have an equal right with every Indian, in each and every portion of the territory,' and the further stipulation *that their laws should not conflict with the Constitution of the United States.* These were executory provisions to be observed in the future by both sides. Without regard to any observance of them on their part, the Indians claim that these treaties are irrevocably binding on the United States. These stipulations naturally grew out of the situation of the country at the time they were made, and of the character of the Indians with whom they were made. The present growth of the country and its present relations to this territory were not thought of or even dreamed of by either party when they entered into these stipulations. These Indians were then at a considerably advanced stage of civilization, and were thought capable of self-government, in conformity with the spirit, if not the forms, of the National Government, within whose limits they were to remain. It was not altogether unreasonable, therefore, to conclude that it would be possible, as it was by them desirable, that these Indians could have set apart to them a tract of country so far remote from white civilization and so isolated that they could work out the problem of their own preservation under a government of their own, and that not only with safety to the Union but with altogether desirable results to themselves.

"For quite a number of years after the institution of this project it seemed successful, and the

Indians under it made favorable advance toward its realization. But within the last few years all the conditions under which it was inaugurated have undergone so complete a change that it has become no longer possible. It is hardly necessary to call attention to the contrast between the present conditions surrounding this territory and those under which it was set apart. Large and populous States of the Union are now on all sides of it, and one-half of it has been constituted a Territory of the United States. These States and this Territory are teeming with population and increasing in numbers at a marvelous rate. The resources of the Territory itself have been developed to such a degree and are of such immense and tempting value that they are attracting to it an irresistible pressure from enterprising citizens. The executory conditions contained in the treaties have become impossible of execution. It is no longer possible for the United States to keep its citizens out of the Territory. Nor is it now possible for the Indians to secure to each individual Indian his full enjoyment in common with other Indians of the common property of the Territory. . . .

"All the functions of the so-called governments of these five tribes *have become powerless to protect the life or property rights of the citizen.* The courts of justice have become helpless and paralyzed. Violence, robbery, and murder are almost of daily occurrence, and no effective measures of restraint or punishment are put forth to suppress crime. Railroad trains are stopped and their passengers robbed within a few miles of populous towns and the plunder carried off with impunity in the very presence of those in authority. A reign of terror exists, and barbarous outrages, almost impossible of belief, are enacted, and the perpetrators hardly find it necessary to shun daily intercourse with their victims. We are now informed that within the Territory of one of these tribes, there were 53 murders during the

month of September and the first twenty-four days of October last, and not a single person brought to trial. . . .

"Besides these they have, by their laws, invited men from the border States to become their employees in the Territory, receiving into their treasuries a monthly tax for the privilege of such employment. They have also provided by law for the intermarriage of white persons with their citizens and adopted them into their tribes. By operation of these laws large numbers of white people have become adopted citizens, participating in the benefits of citizenship. A single instance of such marriage has enabled one white man under the laws to appropriate to his exclusive use 50,000 acres of valuable land. They have, by their legislation, induced citizens of the United States to come in from all sides and under leases and other agreements with private citizens, sanctioned by their own laws, farmed out to them large ranges of their domain, as well as inexhaustible coal deposits within their respective borders, and other material interests which civilized white men alone could turn to profit. In some sections of the Territory the production of cotton has proved so feasible and profitable that white men have been permitted to come in by thousands and cultivate it and build trading marts and populous town for the successful operation of this branch of trade alone. . . .

"*Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of*

the Territory of any kind that can be rendered profitable and available.

"In one of these tribes, whose whole territory consists of but 3,040,000 acres of land, within the last few years laws have been enacted under the operation of which 61 citizens have appropriated to themselves and are now holding for pasturage and cultivation 1,237,000 acres. This comprises the arable and greater part of the valuable grazing lands belonging to that tribe. The remainder of that people, largely the full-bloods who do not speak the English language, are excluded from the enjoyment of any portion of this land, and many of them occupy the poor and hill country where they get a scanty living from such portions as they are able to turn to any account. This class of persons in the territory are making little if any progress in civilization. They are largely dependent on those in control of public affairs, whose will they register at the polls and with whose bidding, in a large measure, they comply without question. Those holding power by these means oppose any change and ask only to be let alone.

"In another of these tribes, under similar legislation, vast and rich deposits of coal of incalculable value have been appropriated by the few, to the exclusion of the rest of the tribe and to the great profit of those who operate them and appropriate their products to their individual use. Large and valuable plants for mining coal have been established by capitalists under leases by which, together with 'discoverer's claims' authorized by the tribal governments, these coal lands are covered, and under the workings of which the rightful owners are being despoiled of this valuable property with very little or no profit to them; and it is clear that this property should be restored to the common domain and protected to the common people, and the mines worked under a system just and equitable to all who have rights therein. . . .

"Large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly, through one of its own officers. . . .

"Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. The United States put the title to a domain of countless wealth and unmeasured resources in these several tribes or nationalities, but it was a conveyance in trust for specific uses, clearly indicated in the treaties themselves, and for no other purpose. It was for the use and enjoyment in common by each and every citizen of his tribe of each and every part of the Territory, thus tersely expressed in one of the treaties: 'To be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole.' The tribes can make no other use of it. They have no power to grant it to anyone, or to grant to anyone an exclusive use of any portion of it. These tribal governments have wholly perverted their high trusts, and it is the plain duty of the United States to enforce the trust it has so created and recover for its original uses the domain and all the gains derived from the perversions of the trust or discharge of the trustee."

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By the act of March 2, 1895 (ch. 189, 28 Stat., 939), the commission was enlarged to five members and directed to continue its negotiations with the tribes in accordance with the authority contained in section 16 of the act of March 3, 1893 (27 Stat., 645).

In its second report, under date of November 18, 1895, the commission (Sen. Doc. No. 12, 54th Cong., 1st Ses., pp. 16, 17, and 20), says:

> "A tribunal was established many years ago for determining the right of admission to this roll, and it was made up at that time by judicial decision in each case. *Since that time and since the administration of public affairs has fallen into present hands, this roll has become a political football, and names have been stricken from it and added to it and restored to it, without notice or rehearing or power of review, to answer political or personal ends and with entire disregard of rights affected thereby. Many who have long enjoyed all the acknowledged rights of citizenship have, without warning, found themselves thus decitizenized and deprived both of political and property rights pertaining to such citizenship.* This practice of striking names from the rolls has been used in criminal cases to oust courts of jurisdiction depending on that fact, and the same names have been afterwards restored to the roll when that fact would oust another court of jurisdiction of the same offense. Glaring instances of the entire miscarriage of prosecution from this cause have come to the knowledge of the commission and cases of the greatest hardship affecting private rights are of frequent occurrence. This practice is persisted in in defiance of an expressed opinion of the Attorney-General of the United States forwarded to this nation on a case presented that it was not in their power to thus decitizenize one who has been made a citizen by this tribunal clothed by law with the authority.

There is no remedy but an interference of the United States. . . .

"These remarks apply specially to the Cherokee Nation, with which the United States has recently entered into obligations in respect to "intruders." But much of what is here said is applicable, also, to the condition of affairs in the other nations. . . .

"If the end of government and the administration of justice is the protection of the life and liberty and property of the citizen, then the governments and courts of these nations are a failure, for they afford that protection to neither. They are powerless to these ends, and the victims of this misrule are helpless sufferers at the mercy of the malign influences which dominate every department and branch of the governments as administered here. It matters little, except as to the character of the remedy, whether this failure and misrule arises from impotence or willful and corrupt purpose, the evil consequences are incalculable and its continuance unjustifiable. It is no less true now than when the commission reported last year that 'all of the functions of the so-called governments of these five tribes have become utterly unable to protect the life or property rights of the citizen. Their courts of justice have become powerless and paralyzed. Violence, robbery, and murder have become almost of daily occurrence, and no effective measures of restraint or punishment are put forth by these governments and courts to suppress crime. . . ."

In conclusion the commission (p. 20), says:

"It is, in the judgment of the commission, the imperative duty of Congress to assume at once political control of the Indian Territory. They have come with great reluctance to this conclusion, and have sought by all methods that might reach the convictions of those holding power in

the Territory to induce them by negotiation and mutual agreement to consent to a satisfactory change in their system of government and appropriation of tribal property. These efforts have failed, and the commission is driven to the alternative of recommending abandonment of these people to the spoliation and outrages perpetrated in the name of existing governments or the resumption by Congress of the power thus abused.

"They therefore recommend immediate legislation as follows:

"'1. A territorial government over the Five Civilized Tribes, adapted to their peculiarly anomalous conditions, so framed as to secure all rights of residents in the same, and without impairing the *vested* rights of the citizen Indian or other person not an intruder.

"'2. The extension of the jurisdiction of the United States courts in the Territory, both in law and equity, to hear and determine all controversies and suits of any nature concerning any right in or use and occupation of the tribal lands of the several nations, to which any citizen Indian or other person, or the tribal government of any nation, is or may be made a party plaintiff or defendant.'

"The commission is confident that such a government wisely administered will restore the observance of law and preserve order among the people residing in these several nations, and make secure their lives and all just property rights. And that the determination in the United States courts of the most important and complicated questions in which the tenure of their land is unfortunately involved, lifting them out of the unhealthy and unreliable influences which prevail in the Indian courts, where now alone they are disposed of, would go far toward a solution of the difficult problem the present condition of the Territory presents."

By the act approved March 1, 1895 (ch. 145, 28 Stat., 693–98, inc.), the Indian Territory was divided into three judicial districts and a court created for each district, which was given jurisdiction after September 1, 1896, of all criminal cases and the jurisdiction theretofore exercised in civil cases greatly enlarged.

In re Johnson, 167 U. S., 124.

(b) *Passage of Act of June 10, 1896, Providing for the Preparation of Rolls of Members of the Five Tribes.*

The Commission to the Five Civilized Tribes, appointed under the acts of March 3, 1893, and March 2, 1895, id., failed to make any agreement with any of the Five Tribes. These estates were being looted and pillaged by a few "*white* men and *mixed breeds*" (Sen. Mis. Doc., 53rd Cong., 3rd Ses., 90) to the exclusion of the blood Indians—the rightful owners of these estates. Those in charge of the Indian governments refused to enter into any agreement with the United States officers for the division in severalty of the estates. The blood Indian was appealing to the Government for protection (Sen. Doc. No. 182, 54th Cong., 1st Ses., 9, 10). Then it was that Congress determined to put an end to a condition that had become intolerable by the enactment of the law of June 10, 1896 (29 Stat., 339–340). When this bill was before the Committee on Indian Affairs of the House of Representatives for consideration that committee not only had before it the reports of the House and Senate select committees and reports of the commission to the Five Civilized Tribes, but also held extensive hearings, at which the condition existing in the Five Tribes was carefully inquired into (Sen. Doc. 182, 54th Cong., 1st Ses., 2). Henry L. Dawes, chairman, and other members of the commission, appeared before

the House Committee and submitted evidence of the conditions existing in the Five Tribes (Sen. Doc. 182, 54th Cong., 1st Ses.). On pages 4 and 5 (*id.*) of the hearings appears evidence of the bribery of the Indian officials openly and unblushingly practiced. On pages 6, 7, 8 and 9 (*id.*) appear protests of the blood Indians against the appropriation of the common lands by a few white men. On pages 8, 27, and 28, lists containing the names of individuals and corporations are set out, showing the vast acreage held by each, in some cases as high as 100,170 acres being monopolized by a single company, which used or leased the lands for the personal gain of its members and to the exclusion of the blood citizens. Pages 32 to 42 inclusive are confined to a statement of the bribery of the officers of the Choctaw Nation and the monopoly of the Choctaw lands and minerals by a few individuals. Mr. M'Kennon (pp. 39–40, id.) said:

> "I want to repeat what Green McCurtain said in a speech at Hartshorn. He said that some people claimed that the common people in Indian Territory were in good condition and happy and not destitute. He described the condition of the full-bloods. He said that formerly they had herds of ponies and cattle and plenty of pasture, and by means of what they raised the life of the full-blood was made easy. They had these herds to sell from, and every family was in easy circumstances; but it is not so now. The public domain has been fenced off until the full-blood Indian has been deprived of his land. While everything appears to be prosperous, and magnificent houses are all around him, one looks at these magnificent farms which are held by the white people, while the Indian sits in front of his cabin with a bushy-tailed pony lariatted to a post.
>
> "The next thing to which I wish to call attention is the holding of coal lands in the Choctaw Nation, and almost everything else of any value, but especially the coal lands. There are citizens there

> who are holding large tracts of these coal lands, and who are receiving in royalties from them immense sums of money—enough to run anyone of these governments, properly and economically administered. We think these royalties belong to the common people. No one man has a right to hold and use the proceeds and profits or land which belongs to the common people. . . . A statement was made by the former collector of the Choctaw Nation, in which he said that $125,000 in royalties was paid to the nation and $65,000 to 39 individuals in 1894."

Because of this situation the act of June 10, 1896 (29 Stat., 339, 340), was passed. The act, after making provision for the continuation of the commission, provided:

> "That said commission is further authorized and directed to proceed at once to hear and determine the applications of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled. Provided, however, That such application shall be made to such commissioners within three months after the passage of this act. The said commissioners shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes.
>
> "And provided, further, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon,

or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes:

"Provided, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: Provided, however, That the appeal shall be taken within sixty days, and the judgment of the court shall be final. That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain

there for use as the final judgment of the duly constituted authorities.

"And said commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs.

"And said commission is further authorized and directed to make a full report to Congress of leases, tribal and individual, with the area, amount, and value of the property leased and the amount received therefor, and by whom and from whom said property is leased, and is further directed to make a full and detailed report as to the excessive holdings of members of said tribes and others.

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof."

It will be observed that this was a general law and provided for the preparation of "citizenship rolls" of each of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes. In determining each application the commission was directed to "respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes" and to "give due force and effect to the rolls, usages, and customs of each of said nations or tribes." By this act Congress attempted to confer power upon a legislative commission to determine treaty rights, which was beyond its power (Jones *vs.* Meehan, 175 U. S., 1, 32, 44 L. Ed., 49, 62). Under this act no "law, usage, or custom" of the Choctaws or Chickasaws could have deprived anyone of the designated class of the right to be enrolled as a "citizen," nor could any

such tribal "law, usage, or custom" confer any right upon any person not of the class mentioned in article 2 of the treaty of 1830. The distinction between property rights in the Choctaw and Chickasaw tribes and those in the Cherokee, Creek, and Seminole tribes will be referred to hereafter when we come to a consideration of the act approved June 28, 1898, 30 Stat., 495–504.

The provision in this act (June 10, 1896), that "the rolls of citizenship of the several tribes as now existing are hereby confirmed" was of such doubtful meaning and import that it gave rise to bitter controversy. Accordingly Congress, in the act approved June 7, 1897 (30 Stat., 83), provided:

> "That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days previous notice that said commission will investigate and determine

> the right of such party to remain upon such roll as a citizen of such nation. Provided, also, that any one whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six."

Subsequent investigation by the commission disclosed the fact that there were no confirmed and authenticated "citizenship rolls" of the Choctaw and Chickasaw tribes. In Mary Elizabeth Martin, applicant for enrollment as a citizen of the Choctaw Nation, Assistant Attorney-General Campbell (Laws Affecting the Five Civilized Tribes, 1893–1906, 158) said:

> "The report of January 24, 1903, in case of Bettie Lewis, above mentioned, is to the effect that the commission has never been furnished any authenticated rolls of citizens of the Choctaw and Chickasaw tribes, and it has no possession or knowledge of any rolls of their citizens made during or prior to 1885, and the commission has never been furnished any roll prior to the leased district payment roll of 1893, which the commission uses, together with the 1896 census roll, as the basis for identification of applicants. The commission, at considerable length, state their correspondence with the executives of these tribes and its own efforts of investigation. The principal chief of the Choctaw Nation advised the commission July 17, 1897, that he had refused to approve the last revised roll made in accordance with an act of council (October, 1896), because he is satisfied there are some names thereon 'that have been registered through fraud or misrepresentation.' The governor of the Chickasaw Nation, July 22, 1897, stated that 'we have only one authenticated roll of citizens and that is the one approved by the legislature in 1896.' The commission also mention having discovered and obtained from individual memoranda rolls made

by Commissioners Ieshatubby and Maytubby of Choctaw Indians residing in the nation and states that . . . it had been the practice of tribal officials charged with any duty in connection with tribal rolls to withdraw them from the executive offices when necessary and to retain them among their personal effects.

"The commission states its clear conviction to be . . . that there had never, prior to the approval of the act of Congress of June 10, 1896, been any rolls of the citizens of the Choctaw and Chickasaw nations which had been ratified and confirmed by the legislative bodies of these two nations or had received the approval of the chief executives. It is a matter of general information in said nations that the rolls made prior to that time were merely census rolls made up separately according to counties and districts by individual census takers in such counties and districts and which were never brought together or consolidated so as to form a complete roll of tribal members."

(c) *Act of June 28, 1898, Under Which Rolls Were Made by the Commission and the Secretary.*

The tribal officials denied the right of the Federal Government to interfere in their tribal affairs, and the great majority of the members of each of the tribes ignored the commission and failed or refused to submit any applications for enrollment. The rolls in the possession of the tribal officials were inaccurate and incomplete, and on account of the limitation of time contained in the act of June 10, 1896, it was impossible for the commission to properly adjudicate even the limited number of applications submitted to it. Accordingly Congress enacted the law approved June 28, 1898 (30 Stat., 495–504, inc.). The Committee on Indian Affairs reporting to the House on the bill which subsequently

(June 28, 1898), became this law (House Rep. 593, 55th Cong., 2nd Ses.), stated:

> "Provision has heretofore been made for the making of rolls of citizenship of the various tribes, but the commission authorized to do the work is of the opinion that to do equal justice to all concerned they should have additional authority, and we believe this measure provides for the settlement of the question of citizenship, so that when the rolls are made the interest of all concerned will [illegible] been fully protected and this vexed and important question will be settled forever."

Section 21 of this act (June 28, 1898, 30 Stat., 502), so far as it pertained to the Choctaws and Chickasaws, provided:

> "That in making rolls of citizenship of the several tribes as required by law . . . said commission is authorized and directed to make correct rolls of the *citizens by blood* of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes.
>
> "Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.
>
> "It shall make a correct roll of all Choctaw

freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

"It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: Provided, however, That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

"Said commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said commission for enrollment at such times and places as may be fixed by said commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said commission to make rolls as

herein required, and to punish anyone who may in any manner or by any means obstruct said work."

"The rolls *so made*, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

"The members of said commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense."

This, as well as the two preceding acts of June 10, 1896, and June 7, 1897, was a general law and directed the commission to prepare "rolls of citizenship" and "freedmen rolls" of each of the five tribes—Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles—special provision being made in the first paragraph of section 21 for the preparation of the Cherokee Citizenship and Freedmen rolls. The second paragraph of this act directed the preparation of "correct rolls of the citizens by *blood* of all the other tribes"—that is, all but the Cherokee tribe, and the commission was further directed to eliminate—

"from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their *descendants born since*

such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the *treaties* and laws of said tribes."

In determining rights in the Cherokee Nation under this act, Mr. Justice Fuller, in Red Bird *vs.* U. S., 203 U. S., 76, 89, 51 L. Ed., 96, 102, said:

> "In Stephens *vs.* Cherokee Nation, 174 U. S., 445, 488, 43 L. Ed., 1041, 1056, 19 Sup. Ct. Rep., 722, 738, this court, in respect of certain acts of Congress, observed:
>
> " 'It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898 (30 Stat. L., 495, chap. 517), a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former.'
>
> "Referring to this, the Court of Claims said in its opinion in the present case (40 Ct. Cl., 411, 442):
>
> " 'It can not be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was *constitutionally* theirs, or to confer upon *white citizens* property which they were not *legally entitled to have*. The term "*citizens*" in these statutes of the United States must be construed to mean those *citizens who were constitutionally or legally entitled to share in the allotment of the lands*.'
>
> "The doctrine is familiar that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished, as manifested by other parts of the act, and the words used may be qualified by their surroundings and connections."

Therefore it is beyond question that the only persons

to be enrolled by the commission were those having *existing constitutional rights in the property under the treaties*. The court below, however, held that the *only persons entitled to share in this property were those who were recognized, at the time of distribution, by the then tribal officials, as entitled to the political right of citizenship under tribal laws, usages, and customs*, including intermarried and adopted white people, thus sustaining the action of the administrative officers (Rec., p. 35). That holding was erroneous. Its vicious effects appear in the distribution now taking place under the rolls as made up by the administrative officers, whereby intermarried and adopted white people have succeeded to the rights of appellants, who are blood Indians and who have been excluded from any share in the property.

That the designated class of Choctaws and Chickasaws mentioned in the second article of the treaty of 1830 had vested rights in this property was recognized in the treaty of 1830, the patent issued thereunder, the correspondence leading up to the treaty of 1837 with the Chickasaws, the treaties of 1855 and 1866, the report of the Commission to the Five Civilized Tribes (Sen. Doc., No. 12, 54th Cong., 1st Ses., 20); and by the report of the select committee of the Senate (Sen. Rep., No. 377, 53d Cong., 2d Ses., 12), hereinbefore reviewed at length. Such recognition was also made by section 11 of the act of June 28, 1898 (30 Stat., 497), wherein it is provided:

> "That nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under such act of Congress."

Section 21 (30 Stat., 502), likewise recognized vested rights. It, in part, provided:

> "Said commission is authorized and directed to

make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship *under the treaties and laws of said tribes.* . . .

"Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands *under article fourteen of the treaty between the United States and the Choctaw Nation* concluded September twenty-seventh, eighteen hundred and thirty. . . .

"It shall make a correct roll of all Choctaw freedmen entitled to citizenship *under the treaties and laws of the Choctaw Nation,* and all their descendants born to them since the date of the treaty.

"It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits *under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes* and their descendants born to them since the date of said treary and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights *under said treaty* shall be determined in such manner as shall be hereafter provided by Congress.

"That nothing contained in this act shall be so construed as to militate against any *rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.*"

Here a legislative commission was authorized and directed to construe various treaties and to determine existing property rights thereunder. In Jones *vs.* Meehan

(175 U. S., 1–32, 44 L. Ed., 49–62), it is stated as a proposition of law long since settled that:

> "The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. Wilson *vs.* Wall, 6 Wall., 83, 89, 18 L. Ed., 727, 729; Reichart *vs.* Felps, 6 Wall., 160, 18 L. Ed., 849; Smith *vs.* Stevens, 10 Wall., 321, 327, 19 L. Ed., 933, 935; Holden *vs.* Joy, 17 Wall., 211, 247, 21 L. Ed., 523, 535."

This was a *legislative* commission and not a part of the *judiciary*. Wallace *vs.* Adams, 143 Fed. Rep., 721. Therefore, it follows of necessity that it did not possess the constitutional power to determine rights in the property of the Choctaws and Chickasaws under the treaties. But if it did possess such power, its authority certainly did not extend beyond the authorization of the statute. The question therefore presented is: Could the commission lawfully confer any right upon any person other than the designated class of Choctaws and Chickasaws mentioned in article 2 of the treaty of 1830, and the patent of 1842 by enrolling such person on the "citizenship rolls," or could it lawfully deprive any member of said designated class of a share in this estate by its refusal to enroll such person on the citizenship rolls?

It must be borne in mind that this was a general law applying to each of the Five Tribes, and that the conveyance of the property to each of these tribes was under different treaties, by different conveyances, and upon different conditions. The conveyance to the Cherokees was under the treaty of December 29, 1835 (7 Stat., 478); to the Creeks under the treaty of February 14, 1833 (7 Stat., 417), and to the Seminoles under the

treaty of March 21, 1866 (14 Stat., 755), while the conveyance to the Choctaws and Chickasaws was under the treaties of September 27, 1830 (7 Stat., 333), and March 24, 1837 (11 Stat., 573). In the case of the Cherokees, Creeks, and Seminoles the conveyance was to the nation for the benefit of its *members* or *citizens*, and no words were used in either of these treaties, and patents issued pursuant thereto that limited property rights to any class. Very different were those grants from that made to the Choctaws and Chickasaws pursuant to article 2 of the treaty of 1830, for by both the treaty and the patent rights in the property conveyed were limited to a designated class, namely, to "them and their descendants."

The word "citizenship" was inappropriately used in connection with the Choctaws and Chickasaws, but the intention of Congress was plain that the commission should place upon the citizenship rolls of those tribes the names of those persons only who were lawfully entitled to property rights under the treaties. For, is it not plain that the object to be effectuated by these rolls was the allotment or division of the property in severalty? The United States Government was not interested in the question of *political rights* in the nations, which were soon to be abolished, and its only object in the preparation of these rolls was to establish a basis for the division of the property in severalty. The word "citizenship" was appropriately used in connection with the Cherokees, Creeks, and Seminoles, for the property of each of those nations belonged to its *citizens*. The commission, however, made no distinction between "citizenship" in the Choctaw and Chickasaw nations and "citizenship" in the Cherokee, Creek, and Seminole nations, and recognized the right to enrollment as *citizens* in all the nations of only such persons as were recognized by the then tribal officials as entitled

to the *political* right of citizenship therein under the tribal laws, usages, and customs at the time it prepared the rolls complained of regardless of *Indian blood or descent*, and regardless of whether the name of the Indian or his ancestor appeared on any one of the more than eighty official rolls of the tribes then in the custody of the department, thereby enrolling intermarried and adopted white citizens and excluding full-blood and mixed-blood Indians who are the appellants herein (Bill, Rec., p. 9, Spec. XIII).

The court below held that this construction of the act of 1898 by the commission was lawful and proper. The court (Rec., p. 35) said:

> "Whatever might be the conclusion reached from a consideration solely of the terms of the treaty of 1830 and the grant of 1842 pursuant thereto, tested by the rules of the common law and those technical rules laid down by the courts to control similar transactions between individuals, it is the opinion of the court that it was the understanding of these Indians at the time the treaty and patent were made, and has been ever since, that the grant of land was made to the Nation for the common use and benefit of its members, whoever they might be from time to time, so long as national existence should continue, and they should continue to occupy it and that when, by the logic of events, it finally became expedient and necessary to change this communal ownership into individual ownership, membership in the tribe at that time became the test as to the right in the individual to share in the lands and property of the tribe. . . .
>
> "The legislative and executive branches of the Government in dealing with these Indian lands and allotting them to individual Indians, have so construed the grants under which those lands are held, and have accordingly made membership in the tribe the test as to the right of the individual

> to receive an allotment. If we are correct in assuming that such was the understanding of the Indians themselves, then, under the authorities above cited, such understanding may well form the rule of construction, and the Government has not erred in making tribal membership or citizenship the test, especially as the terms of the grant and the treaty are reasonably susceptible of such construction."

The exact opposite of the above holding by the court below is reflected in this act (June 28, 1898), and the construction placed upon it by the legal officers of the Government, and as held in Red Bird *vs.* U. S., 203 U. S., 76, 89, 51 L. Ed., 96, 102. That individual rights in this property were recognized by this act is beyond controversy. The second paragraph of section 21, after directing the commission to make "correct rolls of the citizens by blood" of the Choctaws and Chickasaws "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law" expressly admonished the commission to enroll "*such only as may have lawful right thereto.*" Here was an express recognition of individual rights, not conferred by this act, but recognized by it as then existing, and as stated by Judge Amidon in Shulthis *vs.* McDougal, 170 Fed. Rep., 534, in determining the right of a person to share in the Creek estate under this and the above quoted acts of Congress:

> "The right to such a share *is not created by the statutes*, but is simply recognized and enforced by them. The several agreements and acts of Congress are not concerned with the *legal title*, but go back to the actual *beneficial rights of property* as they had always existed in Indian Territory. The act by which the distribution is made is spoken of not as a *grant* but as an *allotment*."

And such was the construction placed upon this section by Assistant Attorney-General Willis J. Van Devanter (now Circuit Judge) in an opinion rendered by him under date of March 17, 1899, and approved by the Secretary, for the guidance of the commission and the Department in the preparation of the rolls. Judge Van Devanter (Sen. Rep. No. 5013, part 2, 59th Cong., 1st Ses., 1554–5) held:

> "Neither did the act of 1898 make any provision for new applications for citizenship. The commission was authorized and directed to enroll the persons indicated, and to investigate the right of all other persons whose names were found upon *any tribal roll*, and to omit all such as may have been placed thereon by fraud or without authority of law. They were not authorized *to add any name not found upon some roll of the tribe*, except those of descendants of persons rightfully upon some roll. . . ."

Under this ruling "citizenship" in the Choctaw and Chickasaw nations would have been confined to the designated class of people mentioned in article 2 of the treaty of 1830, for there were rolls of the tribes dating back to 1830, which had been in the possession of the Government officials at all times since their preparation (Bill, Rec., p. 10). These rolls contained the names of the members of the Choctaw and Chickasaw tribes in 1830 and 1837, respectively, and the inclusion on the rolls made by the commission of those persons only whose names *rightfully* appeared "upon some roll of the tribes" and "their descendants thereafter born" would have limited the enrollment strictly to the designated class mentioned in article 2 of the treaty of 1830. But the commission ignored these instructions and refused to follow them (Bill, Rec., p. 10). Appellants (Rec., pp. 9, 10) alleged in their bill:

> "That said commission and said Secretary

erroneously denied the great majority of complainants the right to enrollment upon the said citizenship rolls on the ground that the tribal laws, usages, and customs superseded the provisions of the treaty under which the grant was made, and that notwithstanding the laws of Congress directed the enrollment on the citizenship rolls of all persons of Choctaw or Chickasaw Indian blood and descent no person could be enrolled as such whose right to enrollment was not recognized by the tribal officials, or whose name did not appear on some one of a half dozen incomplete rolls and parts of rolls of the tribes, which had never been approved or confirmed by the tribal authorities which rolls were secured from officials and ex-officials of the Indian governments, and which rolls had never been guarded or protected as public records, but were permitted at all times to be taken by any person who desired the custody of same and were altered and changed at will by the person in whose possession they might temporarily be; that these incomplete and spurious so-called tribal rolls and parts of rolls were made by persons pecuniarily interested in the division of the trust property and that the commission and the Secretary knew that no reliance could be placed in said alleged rolls, and parts of rolls, when said officers used same as a basis for the preparation of the said final rolls and refused complainants the right to enrollment as citizens because their names did not appear thereon; that even in cases where complainants' names did appear on said so-called rolls and parts of rolls, they were denied enrollment on the ground that they had not made an application to the said commission for enrollment as citizens by blood under said act approved June 28, 1898, and said application did not appear of record in the files of the commission, notwithstanding the fact that neither the said act of Congress or any order of the Department directed or

authorized complainants, when they appeared before said commission, to make any application, the duty of ascertaining their Indian blood and descent and making a record of same devolving wholly upon the said commission; that between the years 1833 and 1860, inclusive, more than eighty rolls of the Choctaws and Chickasaws were made by Government officers and agents and approved by the governors of the nations, which rolls were reasonably accurate and complete, and which rolls have at all times since they were prepared been in the custody of the Secretary of the Treasury and the Secretary of the Interior or the officers of their departments, and upon which rolls appear the names of complainants and each and every person for whose benefit this suit is brought or the names of their ancestors, and upon which rolls trust funds and other property have been distributed, and which rolls show conclusively that complainants are of the designated class of persons for whose exclusive use and benefit said grant was made, and that they are of Indian blood and descent, but notwithstanding the existence of these rolls were known to the administrative officers, and they were directed, by an opinion rendered by the Assistant Attorney-General of the United States, under date of March 17, 1899, and which opinion was approved by the said Secretary on March 17, 1899, and thereby became a law of the Department, to enroll on the citizenship rolls all persons whose names rightfully appeared on any tribal roll and their descendants, said administrative officers did not consult or examine any of said more than eighty rolls, and made no effort to secure the possession of such of said rolls as were in the custody and possession of the Secretary of the Treasury, but did, in open defiance of the act of Congress and the instructions of the Department, deny to complainants enrollment as citizens of said tribes, and thereby illegally prevented complainants from receiving their lawful share of the said trust property."

The exact rolls used by the commission and complained of by appellants are set out in an official report (Sen. Doc., No. 505, 60th Cong., 1st. Ses., 4, 5) of the Secretary in response to a Senate resolution, as follows

Choctaw Nation.

"The 1885 census rolls. The purpose for which they were prepared is not known by this office.

"The 1893 census rolls. These rolls were prepared for the purpose of making the leased district payment.

"The 1896 census roll (No. 1). This roll was prepared for the purpose of complying with the act of Congress approved June 10, 1896.

"The 1896 census roll (No. 2). This roll is practically a duplicate of the above roll, and was not furnished this office as an official roll.

"Memorandum rolls, from which the 1896 census rolls were prepared."

Chickasaw Nation.

"The 1893 Chickasaw pay roll (No. 1). This roll was prepared for the purpose of making the leased district payment.

"The 1893 Chickasaw pay roll (No. 2). This roll was prepared for the purpose of making the leased district payment.

"The 1893 Chickasaw Maytubby roll (No. 1). This is a roll of Indians and whites of the Chickasaw Nation residing in the Choctaw Nation who received the 1893 leased district payment to the Chickasaws.

"The 1893 Chickasaw Maytubby roll (No. 2). This is a roll of Indians and whites of the Chickasaw Nation residing in the Choctaw Nation who received the 1893 leased district payment to the Chickasaws.

"The 1896 Ieshatubby roll. This is a roll of Indians and whites of the Chickasaw Nation residing in the Choctaw Nation, who received the 1893 leased district payment to Chickasaws.

"The 1896 census roll. This roll was made for the purpose of complying with the act of Congress approved June 10, 1896.

"Memorandum roll. This memorandum roll was used by the officials or representatives of the Chickasaw Nation in preparing the 1896 census roll."

Every one of these rolls was prepared by persons claiming to be citizens by blood, adoption, or intermarriage of the tribe or Indian officials, all of whom claimed an interest in the property and whose individual shares would be increased or diminished in proportion to the number of names included thereon.

On page 3 (id.) the Secretary advises the Senate that none of these rolls are complete rolls of the Choctaw and Chickasaw Indians, and that most of them omitted the names of persons included in entire counties and districts of the Choctaw and Chickasaw nations.

A list of ninety-nine rolls prepared by the Government officials and approved by the Indian officials, and which had been in the custody of the Government officials since their preparation, showing those Choctaws and Chickasaws who accepted allotments east of the Mississippi River under the treaties of 1830 and 1837; those who removed west, the payment of annuity funds, and the distribution of rations are set out in the Congressional Record, volume 43, part 4, and appendix, 60th Cong., 2d Ses., pp. 79–80.

So under the law itself and under the holding of the Assistant Attorney-General and outside of the question of a vested right under the treaties and the patent, every *descendant* of a Choctaw once upon *any* tribal roll was entitled to participation, unless the name had been placed upon such roll "by fraud or without authority of law." Of this there was no pretense. Hence, regardless of all other questions such of appellants were

entitled to recover as were on any tribal roll or who had an ancestor thereon. This was the plain intimation of Mr. Justice Day in Garfield *vs.* U. S., 211 U. S., 249, 264, 29 Sup. Ct. Rep., 62, 66, wherein he said:

> "The Government contends, and we have held, that it does not appear in this case whether Goldsby's name was on the original or other tribal rolls—a fact essential to be known in order to determine whether his contention be sound that such enrollment gave him the right to participate in the division of the funds and lands of the nation, irrespective of the action of the Dawes Commission, the court of the Indian Territory, or the Citizenship Court."

(d) *Exclusion of Appellants Because They Did Not Make Application for Enrollment Under the Act of 1898, and the Application Was Not Noted by the Administrative Officers, and Therefore Did Not Appear of Record.*

Appellants in their bill (Rec., p. 10) allege:

> "That even in cases where complainants' names did appear on said so-called rolls and parts of rolls, they were denied enrollment on the ground that they had not made an application to the said commission for enrollment as citizens by blood under said act approved June 28, 1898, and said application did not appear of record in the files of the commission, notwithstanding the fact that neither the said act of Congress or any order of the Department directed or authorized complainants, when they appeared before said commission, to make any application, the duty of ascertaining their Indian blood and descent and making a record of same devolving wholly upon the said commission. . . ."

The act of June 28, 1898, made no provision for the submission of applications. Judge Van Devanter, then

Assistant Attorney-General for the Department, in his opinion rendered March 17, 1899 (Sen. Rep., 5013, pt. 2, 59th Cong., 2nd Ses., 1554), thus instructed the commission:

> "The act of 1897 did not provide for new applications for citizenship. It defined the words "rolls of citizenship" used in the act of 1896, and directed that all names appearing upon the rolls not coming within that definition should be open to investigation by the commission for a period of six months after the passage of said act. *Neither did the act of 1898 make any provision for new applications for citizenship.*"

The Secretary of the Interior in response to a Senate resolution informed the Senate (Sen. Doc., 675, 60th Cong., 2d Sess., p. 5) in answer to the direct question as to whether applications had been used as a basis for the preparation of the tribal rolls under the act of June 28, 1898:

> "Therefore it is practically true that applications were in all instances the basis of action which led to enrollment."

On page 4 (id.) the Secretary says:

> "The law, however, did not require such an application."

Therefore this requirement which resulted in the rejection of the claims of many of appellants was an unlawful, arbitrary exercise of power.

(e) *Directions to Examine All Persons Under Oath and to Make a Record of Their Testimony Disregarded and Ignored by the Commission.*

Appellants in their bill (Rec., pp. 10–11), allege:

> "That said commission was directed by an order issued by the Commissioner of Indian Affairs under date of July 25, 1899, and approved by the

> Secretary of the Interior, to examine all persons under oath appearing before said commission for enrollment and to make a correct record of the statements of each person so examined, so that said record could be forwarded to the Secretary when the case was presented to him for final action on review, but that said commission did not examine all persons so appearing before it under oath and make a record of their testimony; that said commission examined only such persons as the tribal officials denied were entitled to enrollment and made only such memorandum of their statements as the members of said commission saw fit to make of record. . . ."

Under date of July 25, 1899, Commissioner Jones issued instructions to the commission for its guidance in the preparation of the tribal rolls under the act of June 28, 1898. In the course of said instructions (Sen. Rep., 5013, pt. 2, 59th Cong., 2nd Ses., 1558), Commissioner Jones directed:

> "The rolls as made up by your commission must, to become final, receive the approval of the Secretary of the Interior. It will therefore be necessary for you to make a record in all cases sufficient to enable this office and the Department to take intelligent action in the premises, and especially in those cases where your decision either for or against the right of any person to have his name appear upon the roll is complained of.
>
> "For the purpose of this record you will require each applicant for enrollment to present himself in person before the commission at one of its appointments within the tribe in which such applicant claims right to enrollment, for examination under oath, his statements to be taken down by the commission, upon which the commission will determine his right to enrollment, and such record and action of the commission

will be preserved and transmitted with the rolls to be considered by this office and the Department when the rolls made by the commission are submitted for the approval of the Secretary of the Interior."

(f) *Unlawful Acts of the Commission.*

The complainants in their bill (Rec., pp. 11–12) represent:

"That there are on the finally approved citizenship rolls of said tribes the names of several thousand white persons who were intermarried or adopted into said tribes, but who were not of Choctaw or Chickasaw Indian blood and descent, are not of the designated class of persons for whose exclusive use and benefit the grant was made, and whose enrollment as citizens of said tribes was not authorized by any act of Congress or any agreement or pretended agreement with said tribes; that said people were enrolled by findings of the administrative officers based upon tribal laws, customs, and usages and not upon any treaty, grant, agreement or law of Congress; that upwards of 8,000 negroes have been enrolled as Choctaw and Chickasaw "freedmen," whose enrollment was not authorized by any treaty, grant, agreement or act of Congress; that they were enrolled as such by the administrative officers who erroneously construed article 3 of the treaty with the Choctaws and Chickasaws negotiated April 26, 1866, to entitle all persons of African blood and descent, who had at any time been held by the Choctaws and Chickasaws as slaves, and their descendants born prior to July 1, 1902, to be entitled to enrollment as "freedmen;" that in some of the cases of complainants herein the Commission to the Five Civilized Tribes rendered decisions holding them entitled to enrollment as citizens of said tibes, which decisions were approved by the Secretary of the Interior, but complainants' names were not placed

upon the finally approved rolls owing to alleged lack of time on the part of the administrative officers in which to write their names on said rolls before said rolls were finally approved on March 4, 1907; that said finally approved rolls were fraudulently made by said commission and the officers thereof in that one William O. Beall, by name, who was in charge of the Choctaw and Chickasaw enrollment division of said commission, while actually in the employ of said commission, did, during the month of June, 1903, leave the commission and go to the offices of a firm of attorneys doing business under the firm name and style of Mansfield, McMurray & Cornish, and located at the town of McAlester, Choctaw Nation, and which attorneys were employed by the said Choctaw and Chickasaw Nations to oppose and prevent the enrollment on said "Citizenship" and "Freedmen" rolls of all persons whom the officials of said nations did not think entitled to enrollment as "citizens" or "freedmen," and while there during the month of June, 1903, for a money consideration paid by the said firm of attorneys he prepared cases against persons claiming the right to enrollment as "citizens" of the said Choctaw and Chickasaw nations; that in the following month of July, 1903, the said William O. Beall returned to the said commission, and in his official capacity thereafter passed upon and adjudicated the identical cases he had previously prepared against applicants while in the employ of said firm of attorneys; that in order to prevent a reversal of the erroneous and fraudulent decisions of said commission by the said Secretary, parts of the records in the said cases of complainants were suppressed and held in the office of said commission and were not transmitted with the decision of the said commission in the respective cases to the said Secretary of the Interior; that in many cases of complainants parts of the records were taken from the files of the commission and never

returned; that in order to cover up their erroneous and fraudulent action certain officers of said commission refused to permit attorneys for complainants to inspect the records in their cases and at hearings thereon refused to receive and make a part of the record or to permit the stenographer to incorporate in the record statements of the existence of documentary evidence showing conclusively the rights of complainants; that neither the said William O. Beall, secretary of said commission, or Tams Bixby, the commissioner, were lawyers or possessed of any legal learning whatsoever; that the said Beall in the first instance prepared or directed the preparation of all decisions in Choctaw or Chickasaw cases, and that the great majority of the decisions thus prepared were pro forma approved by the said Bixby; that many of said cases presented intricate legal questions for decision, which questions were erroneously decided by the said Beall and Bixby; that in the determination of said cases a decision was used and followed which was written by a man only a few days before he was incarcerated by order of the Supreme Court of the District of Columbia in St. Elizabeth's Insane Asylum, and thereafter died in said Insane Asylum, and which decision was pro forma affirmed by the Commissioner of Indian Affairs, and thereafter pro forma affirmed by the Secretary of the Interior; that said decision related to the rights of persons to enrollment as citizens of the Cherokee Nation, where different laws governed the determination of such rights, and that notwithstanding these facts were known to the officers of the Government having special charge of the work of preparing said rolls, said decision was invoked by them and strictly adhered to in the determination of the rights of persons claiming enrollment as citizens of the Choctaw and Chickasaw Nations; that thereafter the rolls of 'citizenship' and rolls of 'freedmen' thus erroneously and fraudulently made up by

the said commission, were transmitted to the Secretary for his approval; that during the last week in which the Secretary of the Interior had authority to pass upon the rights of said claimants he acted upon 2,023 cases, involving the rights of upwards of 10,000 claimants; that said Secretary did not give to said cases such consideration as was necessary to properly determine the rights of claimants, and that during said week he gave no consideration, in fact, to said 2,023 cases whatsoever, and that the cases of many of complainants were among said cases decided during the week ending March 4, 1907; that on or before March 4th, 1907, the rolls of 'citizenship' and rolls of 'freedmen' of the said Choctaw and Chickasaw nations were finally approved by the said Secretary; that said rolls of 'citizenship' and rolls of freedmen' are not correct and complete rolls."

(g) *Legislation and Agreements With the Tribes After June 28, 1898.*

Section 29 of the act approved June 28, 1898 (30 Stat., 505), was in the form of an agreement with the Choctaws and Chickasaws and was thereafter ratified by a "majority of persons exercising the political right of citizenship in the tribes, whose right to such citizenship was not contested" (Bill, Rec., p. 6, Par. XI, 30 Stat., 505). This section provided in part:

> "That *all lands* within the Indian Territory belonging to the Choctaw and Chickasaw *Indians* shall be allotted to the *members* of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands. . . .
>
> "That each member of the Choctaw and Chickasaw tribes, including Choctaw and Chickasaw freedmen, shall, where it is possible, have the

> right to take his allotment on land, the improvements on which belong to him, and such improvements shall not be estimated in the value of his allotment. In the case of minor children, allotments shall be selected for them by their father, mother, guardian, or the administrator having charge of their estate, preference being given in the order named, and shall not be sold during his (their?) minority. Allotments shall be selected for prisoners, convicts, and incompetents by some suitable person akin to them; and *due care taken that all persons entitled thereto have allotments made to them.*"

By the first provision of this law, above set out, it is provided that "all the lands within the Indian Territory belonging to the Choctaw and Chickasaw *Indians*," (not the *nations*) shall be so "allotted to the members of the tribes," so as to give to each his fair and equal share thereof. Here was a distinct recognition of existing rights and a provision for the partitionment of the property among the lawful owners. The second paragraph, above quoted, not only clearly recognized existing rights, but provided that those possessed of such rights should have the privilege of selecting as their portion of the property, that upon which they had existing improvements and "due care" should be "taken that all persons entitled thereto have allotments made to them."

By act of Congress approved July 1, 1902 (32 Stat., 641), which was thereafter ratified "by a majority of those persons exercising the political right of citizenship, which right was not contested in the tribes" (Bill, Rec., p. 6, Spec. XI), it was provided:

Section 11:

> "There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the

Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section."

Section 27:

"The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats., 495), and the act of Congress approved May 31, 1900 (31 Stats., 221), except as herein otherwise provided; provided that no person claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stat., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined."

Section 28:

> "The names of all persons living on the date of the final ratification of this agreement entitled to be enrolled, as provided in section 27 hereof, shall be placed upon the rolls made by said commission, and no child born thereafter to a citizen or freedman and no person intermarried thereafter to a citizen shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws."

Here again was a distinct recognition of individual rights. Section 11 directed the allotment to each member of the Choctaw or Chickasaw tribes of "land equal to 320 acres of the average allottable land," and to the Choctaw and Chickasaw freedmen of "land equal to 40 acres of the average allottable lands." Section 27 directed the commission to make the rolls in strict conformity with the act of June 28, 1898 (30 Stat., 495), which act, as hereinbefore shown, limited citizenship in the tribes to the designated class of persons mentioned in article 2 of the treaty of 1830, and section 28 of this agreement limited the property rights to the members of said class "living on the day of the final ratification of this agreement entitled to enrollment as provided in section 27 hereof."

By the act approved April 26, 1906, sections 16 and 17 (34 Stat., 143), it was provided:

> Sec. 16. "That when allotments, as provided by *this and other acts of Congress*, have been made to all members and freedmen of the Choctaw, Chickasaw, . . . tribes,"

the residue of the property shall be sold and (sec. 17) the proceeds distributed—

> "per capita to the members then living and the heirs of deceased members whose names appear

upon the finally approved rolls of the respective tribes." . . .

Under section 16 of this act (April 26, 1906), as hereinabove set out, no sale or distribution could be made of the residue or unallotted lands until "allotments as provided by this and other acts of Congress had been made to all members and freedmen of the Choctaw, Chickasaw, . . . tribes." As it is perfectly plain that this has not been done, the Secretary has no authority under the laws of Congress, not taking into consideration the vested treaty rights of appellants, to sell the residue of the lands and to make distribution of the proceeds derived therefrom among appellees whose names appear on the "so-called finally approved tribal rolls." But as alleged by appellants (Bill, Rec., pp. 15–16, Par. XXI) the Secretary will, without authority of law, unless restrained by this court immediately upon completion of allotments to all persons whose names appear upon the "citizenship" and "freedmen" rolls of the Choctaw and Chickasaw nations as approved by him on or before March 4, 1907, sell and dispose of all the residue unallotted lands and other property and distribute the funds derived therefrom among those persons whose names appear upon said "citizenship" rolls to the great, lasting and irreparable injury of complainants.

(h) Individual Rights Recognized in Patent Issued to Allottees.

That individual rights in the common property of the Choctaws and Chickasaws existed is evidenced by the patent now being issued by the Government officers to the allottees. The patent conveys not only "all right, title and interest of the Choctaw and Chickasaw nations," but, "of all other citizens of said nations." The patent is as follows:

"Homestead Patent. ——Roll No——
"No—— Date of Certificate——

"THE CHOCTAW AND CHICKASAW NATIONS.

"Indian Territory.

"To all to Whom These Presents Shall come, Greeting:

"WHEREAS, By the act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw nations September 25, 1902, it was provided there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw nations land equal in value to three hundred and twenty acres of the average allotable lands of the Choctaw and Chickasaw nations; and

"WHEREAS, It was provided by said act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and

"WHEREAS, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of ——, a citizen of the —— Nation, as a homestead.

"Now, therefore, we, the undersigned, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey, unto the said —— all right, title, and interest of the Choctaw and Chickasaw nations and of all other citizens of said nations,

in and to the following described land, viz: —— of the Indian base and meridian, in Indian Territory, containing —— acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of the act of Congress approved July 1, 1902 (32 Stat., 641), pertaining to allotted homesteads.

"IN WITNESS WHEREOF, We, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective nations to be affixed at the dates hereinafter shown.

"Date ——.

"Principal Chief of the Choctaw Nation.

[GREAT SEAL OF THE CHOCTAW NATION.]

"Date ——.

"Governor of the Chickasaw Nation.

[GREAT SEAL OF THE CHICKASAW NATION.]

"DEPARTMENT OF THE INTERIOR.

"Approved ——.
"——, Secretary.
"By ——, Clerk.

"Filed for record in the office of Commissioner to Five Civilized Tribes on —— day of —— 190—
"In book ——, page ——, at ——
"Recorded the —— day of ——, 190—, in the office of the ex-Officio Recorder of the —— District, at ——, Indian Territory, in book ——, page ——, at ——."

It will be observed that the patent is not "framed in accordance with the provisions" of the agreement ratified by Congress and approved June 28, 1898 (30 Stat., 495), in that it purports to convey "all right, title, and interest of the Choctaw and Chickasaw *nations*," whereas the agreement provided that it should pass all the "right, title, and interest of the Choctaws and Chick-

asaws," no mention being made therein of any right, title, or interest of the *nations*.

(i) *Acts of Congress and Agreements With the Choctaws and Chickasaws Only Recognized Existing Treaty Rights.*

It can not be pretended that the acts of June 10, 1896 (29 Stat., 321), June 28, 1898 (30 Stat., 495), and the agreements of June 28, 1898 (30 Stat., 505), and June 1, 1902 (32 Stat., 641), were intended to confer rights in this property. They only recognized existing rights. In Shulthis *vs.* M'Dougal, 170 Fed. Rep., 533, 535, Judge Amidon, speaking for the court (8th Cir. Ct. of Appeals), in determining a question of title in the Creek Nation, said:

> "The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the Federal Government, not only as the home of the tribe, *but as a home for each of the members*. From the time they took up their residence west of the Mississippi, the constitution of the Five Nations provided that their land should remain 'common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made or may rightfully be in possession of them.' The term 'improvements,' as here used, meant not only betterments, but occupancy. Cherokee Nation *vs.* Journeycake, 155 U. S., 196, 210. These 'improvements' passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the

United States, individual States, or to individual citizens thereof. Under such regulations the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society, the *beneficial use of the same had at all times belonged to the members in severalty*.

"It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme, the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share *is not created by the statutes*, but is simply recognized and enforced by them. The several agreements and acts of Congress *are not concerned with the legal title*, but go back to the actual *beneficial rights of property* as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property. The act by which the distribution is made is spoken of *not as a grant*, but as an allotment.

"We are not departing from the well-established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society,

and not to the individual members. Cherokee Trust Funds, 117 U. S., 228, 308; Delaware Indians *vs.* Cherokee Indians, 193 U. S., 127. *So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common.* But when, as here, the time came to disband the tribe, its ownership as a political society *could no longer continue*, and the division of the property was far more nearly *akin to the partition of property among tenants in common* than the grant of an estate by a sovereign owner. Under such a scheme it can not be said that the property which passed to an allottee is a new right or acquisition created by the allotment; the right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light Andrew J. Berryhill acquired his right to the land, in question by his membership in the tribe. *It was his birthright. It came to him by the blood of his tribal parent, and not by purchase.*"

The conveyance of the Creek lands was to the nation, no mention being made of any limitation to either the citizens or members of the tribe (treaty of February 14, 1833, 7 Stat. L., 417). But the property of that tribe belonged to its citizens or members. If, then, as held by the court (id. 533, 535), that grant was made "not only as a home for the tribe, but as a home for each of the members;" that "the beneficial use of the same had at all times belonged to the members in severalty;" that a right to share in that property "is not created by the statutes, but is simply recognized and enforced by them;" that Berryhill's right to the land "came to him by the blood of his tribal parent, and not by purchase"—the statute under which the Creek rolls were made being section 21 of the act of June 28, 1898 (30 Stat. L., 502),

the identical statute under which the Choctaw and Chickasaw rolls were made by the administrative officers—can it be claimed that, notwithstanding the treaty of 1830 and the patent of 1842 limited the grant to "them and their descendants," that no blood Choctaw or Chickasaw has any right today in the property in controversy unless such a right has been conferred upon him by the administrative officers in writing his name on the so-called "final citizenship" rolls of the tribes?

Are appellants, who are blood Indians, barred from asserting their rights in the courts, when their denial by the administrative officers of matured treaty rights was not only the result of erroneous construction of the statutes, but also accomplished through bribery, fraud, and other misconduct on the part of the administrative officers? The court below held that they are, and that it could afford them no relief; that their only remedy was an appeal to the mercy of Congress.

(j) *Property of Appellants Could Only Have Been Taken by Due Process of Law.*

As the property in controversy belonged exclusively to the designated class mentioned in article 2 of the treaty of September 27, 1830, it is obvious that neither the commission, the Secretary, the Citizenship Court, the territorial courts in Indian Territory or any other legislative tribunal, could have by any finding, judgment or decree conferred any right in this property upon any person other than those of the designated class, nor could such legislative tribunal deprive any member of such designated class of his lawful distributive share. As the adopted and intermarried white people and negroes enumerated (Bill, Rec., p. 13), in paragraph 15 of the bill, were not of the said designated class, their

enrollment on the "Citizenship" and "Freedmen" rolls and the issuance to them of instruments purporting to be patents and purporting to convey to them good titles to the lands allotted to them by reason of their enrollment, did not confer upon them rights in this property; nor can the Secretary by approval of contracts with attorneys, which contracts are made with intermarried and adopted white citizens, confer any right in this property upon the attorneys or the intermarried and adopted white citizens (Bill, Rec., p. 14, Par. XVIII); nor can he lawfully deprive such of appellants as are of the said designated class, of the property upon which they have made improvements, by allotting the property to appellees whose names appear on the approved "Citizenship" and "Freedmen" rolls (Bill, Rec., p. 15, Par. XIX); nor can the Secretary lawfully confer by deed, or otherwise any right in and to this property upon appellees whose names appear upon the "freedmen" rolls and who claim under act of Congress approved April 26, 1906 (34 Stat., 143, sec. 16), the right to purchase at a fictitious valuation additional land sufficient to make up allotments of forty acres each (Bill, Rec., p. 15, Par. XX); nor can he lawfully sell and dispose of the residue or unallotted lands after allotments have been made to appellees and divide the proceeds derived therefrom among the appellees to the exclusion of appellants (Bill, Rec., pp. 15–16, Par. XXI); nor can he lawfully withdraw from allotment 1,386,720 acres of these lands for inclusion in a game preserve or forest reserve and thus deprive appellants as well as all other lawful owners thereof of their rights to this property (Bill, Rec., p. 17, Par. XXV); nor can he lawfully under any act of Congress sell at a fictitious valuation the lands included in the reserve near Sulphur, Chickasaw Nation, and pass a good title thereto (Bill, Rec., p. 18, Par. XXVI); nor can he lawfully give away under any

act of Congress this property to individuals and companies and make a valid conveyance thereof (Bill, Rec., p. 18. Par. XXVII); nor can he lawfully pay to appellees whose names appear upon the "citizenship" rolls to the exclusion of appellants, the proceeds derived from the lease of the coal and asphalt lands (Bill, Rec., pp. 18–19, Par. XXVIII and XXIX). The $750,000 paid to Mansfield, McMurray & Cornish, which appellants (Bill, Rec., p. 16, Par. XII) allege these attorneys received as a result of the bribery of members of the Citizenship Court, having been paid out of the trust funds in which appellants have a vested right, is recoverable if the truth of this allegation can be established; likewise the amounts alleged to have been fraudulently obtained (Bill, Rec., p. 16, Par. XXVIII) by certain persons therein enumerated.

(k) *Relation of Mansfield, McMurray & Cornish to the Case.*

Appellants in their bill (Rec., pp. 6, 7, 8 and 9, Par. XII) allege:

> "That by the act approved June 10, 1896, appeals were provided for from the decisions of the said commission in all 'citizenship' cases coming before the said commission under said act, to the United States district courts in the then Indian Territory; that appeals were taken under the provisions of the said act in cases involving the rights of about five thousand persons to 'citizenship' in the said Choctaw and Chickasaw nations; that said cases were heard and determined by the said United States district courts and judgments were rendered in favor of about four thousand claimants entitling them to have their names placed upon the 'citizenship' rolls of the said nations; that said judgments rendered by the United States district courts were carefully examined by members of a firm of attorneys doing business

under the firm name and style of Mansfield, McMurray & Cornish, with offices at McAlester, Choctaw Nation, and which attorneys were employed by and represented the Choctaw and Chickasaw nations; that said examination resulted in establishing the fact that about 140 names of persons had been erroneously or fraudulently included in said judgments; that said fact was called to the attention of said district courts and said names erroneously or fraudulently included in said judgments were stricken from said judgments; that on June 28, 1898, another act was approved authorizing appeals to the Supreme Court of the United States from judgments rendered in said "citizenship" cases by the said United States district courts; that many of said cases were appealed to the United States Supreme Court and there consolidated and heard as one case, and on May 15, 1899, judgment was rendered by the Supreme Court affirming the constitutionality of the legislation under which the appeals had been taken to the United States district courts and the regularity and validity of said judgments therein rendered; that thereafter, and on, to wit, January 17, 1901, the Choctaw and Chickasaw nations, through their principal chief and governor, respectively, entered into an inchoate contract at Sherman, Tex., with George Mansfield, J. F. McMurray, and Melvin Cornish, who were then associated together in the practice of law and doing business under the firm name and style of Mansfield, McMurray & Cornish, with offices at McAlester, Choctaw Nation, and who then represented the Choctaw and Chickasaw nations as attorneys, receiving therefor an annual salary of $10,000 and allowances for expenses aggregating about $5,000 per annum; that by said inchoate contract said attorneys agreed to prevent the said persons whose names were included in the said judgments of the United States district courts from receiving any portion of the common property now in controversy; that it was

agreed by and between the contracting parties that the individual shares in the said property should be $4,800, and that the said firm of attorneys should receive nine per cent of said amount for each person who had theretofore been decreed entitled to enrollment as a 'citizen' of said nations by the United States courts, and who was deprived of the right to share in the common property of the Choctaws and Chickasaws as a result of their efforts; that said attorneys went to Washington and made false and fraudulent representations to the committees of Congress, and to the individual members thereof, with reference to said judgments; that Congress acting upon said false and fraudulent representations included a provision, drafted by the said attorneys or someone representing them, in an act which was approved July 1, 1902, providing among other things for the creation of a Legislative Commission to be known as the 'Choctaw-Chickasaw Citizenship Court;' that said commission was composed of three members who were appointed by the President and confirmed by the Senate of the United States, by name, Spencer B. Adams, Walter L. Weaver, and Henry S. Foote; that said commission was authorized to pass upon two questions of law which had been previously determined by the United States district courts in the Indian Territory and their decisions thereon affirmed by the Supreme Court of the United States; that it was provided in said act that if the said legislative commission found that the said courts had erred in determining these two questions of law, that said commission should render a finding and decree to that effect and that said finding and decree should operate to vacate and annul all the judgments rendered by the United States district courts in favor of said persons as citizens of the said Choctaw and Chickasaw nations, and that said court should then proceed to try de novo all of such cases thereafter brought before it for consideration and de-

cision; that said court rendered a finding and decree which, under the provisions of said act, rendered void all the judgments entered in all said cases by the said United States courts; that thereafter cases involving the rights of 3,304 persons were brought before said court for consideration and determination; that all said persons included in said cases, with the exception of 156 persons, were denied enrollment as citizens of said nations by findings made and decrees entered by said legislative commission; that said attorneys thereafter secured the incorporation of a provision in an act of Congress approved March 3, 1903, authorizing the said legislative commission, upon final determination of the cases coming within its jurisdiction, to fix reasonable compensation for said attorneys under the said inchoate contract dated January 17, 1901; that upon the rendition of all decrees by the said legislative commission, the said commission awarded the said firm of attorneys the sum of $750,000, as a fee for services rendered in said cases, which award was certified to the Secretary of the Interior and by him certified to the Secretary of the Treasury and paid out of the trust funds of the Choctaws and Chickasaws by warrant drawn by the Treasurer of the United States on said funds; that many of the persons thus deprived of the right to enrollment as citizens of the Choctaw and Chickasaw nations were among the designated class of persons for whose exclusive use and benefit the grant was made and are complainants herein; and the trust funds belonging to said designated class of persons, in which funds they had and have a vested right, were unlawfully paid to said attorneys for alleged services rendered before said court and Congress in this unconscionable attempt to deprive them of their lawful property interests; that said legislative commission did not confine its inquiry into the rights of persons whose cases came before it for determination to the one question as to

> whether or not they were members of the designated class of persons mentioned in said treaty and grant, but pretended to determine the rights of said persons solely upon their rights to "citizenship" in said nations under the laws, customs and usages of the said nations; that complainant is reliably informed and verily believes, and therefore alleges on information and belief, that certain members of said legislative court were bribed by said attorneys to render findings and decrees denying to said persons their property rights as citizens of said tribes, and received as a consideration for their decisions a part of the fee of $750,000, awarded by said court to said attorneys for alleged legal services rendered in said cases coming before said court; that Spencer B. Adams and Henry S. Foote were the members of said court alleged to have been bribed."

Such of appellants as are of the designated class mentioned in article 2 of the treaty of 1830, who were deprived by the findings, judgments or decrees of this legislative commission are entitled to the recovery of their property rights. By act of July 1, 1902 (sec. 33, 32 Stat., 641), the judgment of this legislative commission was made final. Therefore, its findings, even though known to the Secretary to have been fraudulent, were beyond review by him. The $750,000, if fraudulently obtained by Mansfield, McMurray & Cornish, through the bribery of members of the Citizenship Court, being a part of the trust funds of the designated class, is recoverable and the trial court had ample jurisdiction to have determined this question.

(l) *Provision of Act Approved June 28, 1898, Requiring Residence as Well as Agreements Ratified by Congress June 28, 1898, and July 1, 1902, Unconstitutional and Void.*

The bill (Rec., p. 6) alleged that:

> "So much of the act of Congress approved June 28, 1898, as prohibited the enrollment of any person who was a member of said designated class of persons because said person was not a bona fide resident of said nations on the day said act was approved, as well as the agreement approved July 1, 1902, prohibiting the distribution of any share of said property to any person so situated, was unconstitutional, null and void; that both agreements approved June 28, 1898, and July 1, 1902, were unconstitutional, null and void, because they were not approved by said designated class of persons, or by a majority of said designated class of persons; that no one but adult males were permitted to participate in the elections, at which said pretended agreements were claimed to have been ratified, whereas, the property belonged as much to the women and minor children as it did to the adult males and no valid agreement could have been entered into without their approval and consent; that at said elections, several thousand persons who had been adopted or who had intermarried into said tribes and who had thereby acquired civil and political rights, but who were not of the said designated class of persons for whose exclusive use said grant was made, and therefore had no lawful interest in said property, were permitted to vote in said elections, which resulted in the alleged ratification of said agreements, and that it was by reason of the votes of said intermarried and adopted persons that said agreements were apparently ratified; that no person, not even a male adult, who was a member of said designated class of persons was permitted to vote in said elections unless he had theretofore

been recognized by the tribal authorities and enrolled on one of the tribal rolls prepared by persons pecuniarily interested in the division of the tribal property and was at the time of said election a bona fide resident of said nations; that said pretended agreements were never approved by complainants, were never in truth and fact, or in law, ratified by a majority of the lawful owners of said property, and are, therefore, unconstitutional, null and void."

(1) *If Provision of Act of June 28, 1898, Prohibited Enrollment of Such of Appellants as Were Not Bona Fide Residents of Said Nations and Thereby Excluded Them From Participation in the Distribution of the Property it Was Void.*

Appellants' claim, therefore, is that if the provision of section 21 of the act of June 28, 1898 (30 Stat. L., 502):

> "No person shall be enrolled who has not heretofore removed to, and in good faith settled in the nation in which he claims citizenship,"

excluded such of appellants as did not actually so reside, as held by the administrative officers, that it was unconstitutional, null and void.

The rights of appellants being vested rights under a treaty and grant, Congress could neither construe their rights nor limit participation in the property to those who were bona-fide residents of said nations on the day the act was approved. Jones *vs.* Meehan, 175 U. S., 1–32. Failure to remove and live on the western lands did not under the treaty of 1830, under which the grant was made, deprive any member of the Choctaw community on the day on which the treaty was ratified, or the descendant of any such person of participation in the western lands, but only deprived those taking allotments in severalty in Mississippi and Alabama, under the four-

teenth article of the right to participate in the funds collected from the sale of the residue of the eastern lands of the Choctaws. Neither treaty made residence necessary and in the absence of such a provision, the place of residence was immaterial.

> Hy-Yu-Tse-Milkin *vs.* Smith, 194 U. S., 401, 48 L. Ed., 1093.
>
> Bonifer *vs.* Smith, 160 Fed. Rep., 846.

But if removal were necessary this requirement was expressly waived by the United States by the act of February 8th, 1887 (Chap. 119, 24 Stat. L., 390, section 6), which provided:

> "That . . . every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Sections 1, 2, and 3, of the act of August 9, 1888 (25 Stat. L., 392), and section 1 of the Indian appropriation act of June 7, 1897 (30 Stat. L., 90), extended similar inducements and protection to Indian women and their children.

If, however, as appellants contend, the provision (id., sec. 21) requiring residence was rendered ineffective by the provision in section 11 (30 Stat. L., 497):

> "Provided that nothing herein contained shall

> in any way affect any vested legal rights which may have been heretofore granted by act of Congress nor be so construed as to confer any additional rights upon any parties claiming under any such act of Congress,"

then it was not void and did not exclude appellants from either enrollment or participation in the common property, and their exclusion by the administrative officers on this ground was error which the court has ample power to correct.

(2) *Authority Under Which the Distribution of the Property is Now Proceeding not Under "Agreements," but Under Laws of Congress.*

Section 29 of the act of June 28, 1898 (30 Stat. L., 505), and the alleged agreement of July 1, 1902 (32 Stat. L., 641), commonly known as the Atoka, and supplemental agreements with the Choctaws and Chickasaws, respectively, were not agreements but acts of Congress. They were not ratified by a majority of the blood Indians, but their ratification was only accomplished through the votes of intermarried and adopted white citizens who hoped thereby to vote themselves an interest in this property. In Red Bird *vs.* U. S., 203 U. S., 75, 93, 51 L. Ed., 96, 104, Mr. Chief Justice Fuller said of a similar "agreement" with the Cherokees:

> "Counsel for claimants speak of the act of 1902 as a 'treaty,' but it is only an act of Congress, and can have no greater effect. It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites. The suggestion is wholly inadmissible that they could vote themselves an interest in the property of the

> Cherokee people, including a share in the money paid in by the Delawares and the Shawnees, and become thereby wards of this Government."

As these alleged "agreements" were in fact only acts of Congress they could not affect the vested rights secured to appellants under the treaty of 1830 and by the special grant of 1842.

As the Chickasaws acquired by the treaty of 1837 rights in this property "on the same terms that the Choctaws hold it," their rights are also vested rights and could not be impaired by any act of Congress.

(m) *Choctaw and Chickasaw National or Tribal Governments Abolished.*

By the laws of Congress and the "agreements" with the tribes heretofore set out, the Choctaw and Chickasaw National governments have been abolished. They today possess none of the attributes and perform none of the functions of governments. In U. S. *vs.* Allen, 171 Fed., ——, Judge Campbell said:

> "But by various and successive acts of Congress, these tribes have been shorn of their governmental functions; their courts have long been abolished; their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the State public school system; tribal tax is abolished; provision is made for the sale of their public buildings and lands; their legislature shall not be in session for a longer period in any one year than thirty days, and no act, ordinance, or resolution thereof, except resolutions of adjournment, are valid without approval by the President."

The Secretary of the Interior has no authority to hear and determine the claim of any person in this estate, for his jurisdiction ceased on March 4, 1907, under section 2 of the act of April 26, 1906 (34 Stat., 138).

9. Appellants' Rights Are In No Sense Political.

It was held by the court below (Rec., p. 35) that the lands and moneys of the Choctaws and Chickasaws are "public lands and public moneys" and that the right of any claimant to share therein presents a political question, cognizable only by the political branch of the Government. This holding was based upon a misconception of the decisions in Stephens *vs.* Cherokee Nation, 174 U. S., 445, 43 L. Ed., 1041: Cherokee Nation *vs.* Hitchcock, 187 U. S., 241, 308, 47 L. Ed., 183, and Wallace *vs.* Adams, 204 U. S., 415, 426, 51 L. Ed., 547.

None of these decisions have any bearing on the questions here involved, as a brief review thereof will show.

(a) *Stephens Case.*

In Stephens *vs.* Cherokee Nation, 174 U. S., 445, 43 L. Ed.,, 1041, this court determined only the constitutionality or validity of the legislation of Congress respecting the political question of "citizenship" in the "Five Civilized Tribes." The appeals authorized by the act of July 1, 1898, to this court extended only to the determination of the validity of the legislation under which judgments had been entered by the United States courts in Indian Territory adjudging certain persons to be "citizens" of the Cherokee, Creek, Seminole, Choctaw and Chickasaw nations. The court did not even consider the rights of any Choctaw or Chickasaw claimants to share in the common property under the treaty of 1830 or the special grant of the property made in 1842 or under any other treaty or law of Congress.

In deciding this question (p. 479) it was said:

> "Was it the intention of Congress to impose on this court the duty of reexamining the facts in

the instances of all applicants for citizenship who might appeal; of construing and applying the treaties with and the constitutions and laws, the usages and customs of, the respective tribes; of reviewing their action through their legislative bodies, and the decision of their tribal courts and commissions, and of finally adjudicating the rights of each applicant under the pressure of the advancement of each case on the docket to be disposed of as soon as possible? Or, on the other hand, was it the intention of Congress to submit to this court only the question of the constitutionality or validity of the legislation in respect of the subject-matter? We have no hesitation in saying that in our opinion the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian Territory.

"Two classes of cases are mentioned. (1) Citizenship cases. The parties to these cases are the particular Indian tribe and the applicant for citizenship. (2) Cases between either of the Five Civilized Tribes and the United States. Does the limitation of the inquiry to the constitutionality and validity of the legislation apply to both classes? We think it does.

"It should be remembered that the appeal to the United States court for the Indian Territory under the act of 1896 was in respect of decisions as to citizenship only and that in those cases the jurisdiction of the Dawes Commission and of the court was attacked on the ground of the unconstitutionality of the legislation. The determination of that question was necessarily in the mind of Congress in providing for the appeal to this court, and it can not reasonably be supposed that it was intended that the question should be reopened in cases between the United States and the tribes."

In this case the applicants claimed that under the findings of the Dawes Commission and the judgments of

the United States court in the Indian Territory finding or adjudging them to be "citizens" of the five tribes, each applicant had vested rights in the property of the particular tribe in which he had been adjudged a citizen as a result of his "citizenship judgment." On this point the court (p. 478) says:

> "In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action which is citizenship or not, is placed by the judgment of a lower court beyond the power of reexamination by a higher court though subsequently authorized by general law to exercise jurisdiction." . . .

The question of ownership (whether national or individual) of the lands of the Choctaws and Chickasaws was not in issue, but merely the power of Congress to provide for a review by this court of the decisions of the Dawes Commission and the Territorial district courts on questions of citizenship, was in issue. The court (p. 478), therefore, assumed—

> "that Congress possessed plenary power of legislation over them, subject only to the Constitution of the United States,"

and also assumed that the lands of the Choctaws and Chickasaws were the lands of the nations and held by the nations, the same as the lands of the Cherokees. This assumption was all right, as the nature of the title was not in issue, and for the purposes of determining the questions presented—i. e., the validity of the legislation authorizing an appeal to this court for the pur-

pose of determining the validity of legislation respecting citizenship, the nature of the title was utterly and wholly immaterial and irrelevant. In section 11 of the act, Congress expressly declared that nothing in the act should or was intended to disturb vested rights or to confer additional rights.

On page 484 the court says:

> "As to the general power of Congress, we need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in Cherokee Nation *vs.* Southern Kansas Ry. Co., 135 U. S., 641, 34 L. Ed., 295–301."

In the case referred to Mr. Justice Harlan said:

> "The lands in the Cherokee Territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the General Government to take them for such objects as are germane, to the execution of the powers granted to it; **provided only, that they are not taken without just compensation being made to the owner.**"

Continuing, the court in this (Stephens) case (p. 488), said:

> "We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to share in the latter would

> not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect to the determination of citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

It will be observed that the court in the above quotation says:

> "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right of a share in the latter would not necessarily follow from the concession of the former."

These words are significant. The act of 1898, section 21, directed the Commission to the Five Civilized Tribes to make up rolls of citizenship, and directed the commission how to make said rolls. Section eleven of the same act directed the commission, when the rolls of citizenship of any one of the tribes was fully completed, and the lands were surveyed, to proceed to allot the "exclusive use and occupancy of the surface of the lands" of the nations among the citizens thereof, and then added:

> "That nothing herein contained shall in any way affect any vested legal rights which may have heretofore been granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any such act of Congress."

The rights of appellants in the common property of the Choctaws and Chickasaws were vested rights, not dependent upon "citizenship" in the tribes. Therefore in the language of the court:

> "The right to share in the latter (property) would not necessarily follow from the concession of the former (citizenship)."

In Wallace *vs.* Adams, 204 U. S., 415, 426, 51 L. Ed., 547, this court said what it decided in the Stephens case:

> "While the act of July 1, 1898, provided for an appeal to this court, and appeals were taken in many cases, yet our inquiry stopped with the question of the constitutionality of the legislation. In other words, we entertained and decided the purely judicial question of the validity of the means Congress had adopted for determining the matter of citizenship. We did not attempt to pass upon the question of citizenship in any particular case, nor determine whether the applicant was or was not entitled to be enrolled as a citizen."

In Garfield *vs.* U. S., 29 Sup. Ct. Rep., 62, 66, 211 U. S. 249, 264, it was clearly intimated that if the name of the claimant Goldsby, a Chickasaw Indian, appeared upon a tribal roll he was entitled to participate in the distribution of the property "irrespective of the action of the Dawes Commission, the court of the Indian Territory or the Citizenship Court."

In Red Bird *vs.* U. S., 203 U. S., 76, 89, 51 L. Ed., 96, 102, Mr. Justice Fuller, speaking for the court and quoting with approval from a decision of the Court of Claims, construing the act of June 28, 1898, said:

> "It can not be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs, or to confer upon white citizens property which they were not legally entitled

> to have. The term 'citizens' in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands."

(b) *Cherokee Nation vs. Hitchcock.*

In Cherokee Nation *vs.* Hitchcock, 187 U. S., 294, L. Ed., 47, 183, this court held that the grant of power contained in the act of June 28, 1898, to the Secretary of the Interior to lease portions of the public domain of the Cherokee Nation, was a valid exercise of Congressional authority. Mr. Justice White, however, significantly (p. 307) remarked:

> "There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the act of 1898 has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

(c) *Wallace vs. Adams.*

In Wallace *vs.* Adams, 204 U. S., 419, this court again determined the validity of the means adopted by Congress for determining the purely political question of "citizenship." The court said:

> "There is but a single matter to be determined. As counsel for plaintiffs in error say: 'The assignment of errors presents but one question. If the decree of the Choctaw-Chickasaw Citizenship court in the test case known as the Riddle case, vacated the decree that defendant Hill had theretofore procured in the United States Court for the Southern District of the Indian Territory wherein he was adjudged to be a member of the Choctaw tribe of Indians, this case should be affirmed. If it did not, it should be reversed.'"

(d) *Garfield vs. U. S., 29 Sup. Ct. Rep., 62, 66, 211 U. S., 249, 264.*

In this recent case, Mr. Justice Day said:

> "The Government contends, and we have held, that it does not appear in this case whether Goldsby's name was on the original or other tribal rolls—a fact essential to be known in order to determine whether his contention be sound that such an enrollment gave him the right to participate in the division of the funds and lands of the nation, irrespective of the action of the Dawes Commission, the court of the Indian Territory, or the Citizenship Court."

The plain implication of this is that if the name did appear upon any tribal roll, there is a right to be enforced by the courts.

10. There is a Remedy in the Courts.

(*a*) If an interest was vested in appellants by the treaty of 1830, or if the names of appellants or their ancestors appeared upon any tribal roll, then they were entitled to an enforcement of their rights in this proceeding. This question was recently determined in Garfield *vs.* U. S., 211 U. S., 249, 264, 29 Sup. Ct. Rep., 62, 66, wherein Mr. Justice Day, after a review of the authorities, said:

> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred

> by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

(*b*) That the trial court in this case had jurisdiction to determine whether the Secretary of the Interior had acted, and was acting, outside of the scope of his lawful authority, has been too long settled by the decisions of this court to require extended argument. In Marbury *vs.* Madison, 1 Cranch, 152, 162, 2 L. Ed., 60, 69, Mr. Chief Justice Marshall said:

> "This brings us to the second inquiry, which is, 2d. If he has a right, and that right has been violated. do the laws of this country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. . . . If one of the heads of departments commits any illegal acts under color of his office, by which an individual sustains an injury, it can not be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding and being compelled to obey the judgment of the law."

In Central of Georgia R. Co. *vs.* Railroad Commission of Alabama, 161 Fed. Rep., 959, the court said:

> "Within the scope of their delegated authority, the acts of State officers are the States' acts. When they transgress the limits of their authority, it is not the State which acts, 'for as it can act and speak only by law, whatever it does say and do must be lawful,' but is 'the mere wrong and trespass of individuals, who falsely speak and act in its name.' Poindexter *vs.* Greenhowe, 114 U. S.,

> 290, 5 Supt. Ct., 914, 29 L. Ed., 185. If the acts of officers of these departments, outside of the scope of the power entrusted can not be effectively stayed when necessary to save the liberty and property of the citizen from illegal invasion under color of State laws, because such proceedings are suits against the State, which the citizen can not maintain, there is an end of real constitutional government and liberty, and the enthronement in their stead of official absolutism. The Constitution deals with substances, not shadows. Its inhibition was levelled at things, not the name."

In Cunningham *vs.* Ashley, 14 Howard, 377, 388, 14 L. Ed., 462–467, this court said:

> "The officers of the Government are the agents of the law. They can not act beyond it provisions, nor make compromises not sanctioned by it."

The courts of this country have frequently enjoined public officers, notably the Secretary of the Interior, from committing an unlawful act and thereby encroaching upon private rights, as will appear from the following decisions:

Union River Logging Railroad *vs.* Noble, Sec. of the Interior, et al., 147 U. S., pp. 165–176; 37 L. Ed., 123.

Kendall *vs.* U. S., 12 Peters, 524.

Hoover *vs.* McChesney, 81 Fed., 472–485.

Hoke Smith *vs.* Reynolds, 9 App. D. C., 216.

Kirwan *vs.* Murphy, Court of App., 8th Cir., 49 U. S. App., 658.

Caldwell *vs.* Robinson, 59 Fed. Rep., 653.

Dinsmore *vs.* Southern Express Co., 92 Fed. Rep., 714 (see, also, cases therein cited).

Webster *vs.* Douglas Co., 102 Wis., 181; 78 N. W., 451.

The Minneapolis Brewing Co. *vs.* McGillivay, 104 Fed. Rep., 258.

(c) *Conclusion.*

In Lytle *vs.* Arkansas, 9 How., 314, 333, 13 L. Ed., 153, 160, this court said:

> "It is a well-established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

And so, in conclusion, counsel for appellants respectfully submit that the trial court did have jurisdiction of this cause; that appellants were entitled as of right to have their claims heard and determined on their merits, and that upon a hearing it was the duty of the trial court to have afforded them such relief as they were in law, equity and good conscience entitled to.

Respectfully submitted.

JOHN G. CARLISLE,
FRANK HAGERMAN,
WEBSTER BALLINGER,
ALBERT J. LEE,
Solicitors for Appellants.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 253.

J. E. FLEMING ET AL., APPELLANTS,

vs.

GREEN McCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD ET AL.

REPLY BRIEF OF APPELLANTS.

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I.

There is Jurisdiction Here.

(*a*) Although his predecessor, pursuant to direction made in an act of Congress (Orig. Brief, p. 31), at last term successfully moved the advancement of this case upon its merits, the present solicitor general in his brief (pp. 44, 49) suggests that the appeal be dismissed because it was taken directly to this court solely upon a question of jurisdiction general to all courts and not relating to Federal courts as such. Louisville *vs.* Knott (191 U. S., 225, 48 L. Ed., 159) and like cases are relied upon in support of the contention. The appellees, the Secretary of the Interior and McCurtain, long since entered their general appearances. No appearance was entered for appellees Johnston and Mansfield. The brief for McCurtain raises no

such question. However, a question of jurisdiction should never be ignored, hence it demands some attention.

(*b*) The bill (Rec., pp. 1, 23) asserted vested rights in Indian lands secured by the Indian treaty of September 27, 1830 (7 Stat., 333), and the Government patent of 1842, which were unconstitutionally impaired or destroyed by administrative action under subsequent legislation apportioning the same. The case, therefore, involved the construction of a treaty and the application of the Constitution of the United States. By the express terms of the law (26 Stat., 827, sec. 5) it was directly appealable here, where this court could, regardless of any certificate, pass upon all the questions in the case, even those of a jurisdictional nature (Chappel *vs.* U. S., 160 U. S., 499, 40 L. Ed., 510, 513).

(*c*) It clearly follows that an appeal here authorizes the review of the *entire* case, though the court below, under the act of March 3, 1891, certifies a jurisdictional question. So it was expressly decided in Giles *vs.* Harris, 189 U. S., 475, 47 L. Ed., 909, and Bien *vs.* Robinson, 208 U. S., 423, 52 L. Ed., 457, 458. This court in the first of these cases said that the jurisdictional "certificate was unnecessary to found the jurisdiction of this court and *could not narrow it*."

(*d*) Counsel, however, say that these cases are not controlling, because an order allowing an appeal is necessary (Barrell *vs.* Transportation Co., 3 Wall., 424, 18 L. Ed., 168), and in this case the appeal must be limited to the question of jurisdiction because the petition for the appeal (Rec., pp. 41, 42) and the order granting the same (Rec., p. 42) recited it to be upon the ground of jurisdiction, though not such as pertained to the Federal court as such. The point as argued is that if by a certificate under the act, the appeal, as *allowed*, is to the jurisdiction of a Federal court *as such*, then it can be used for

no other purpose. If such were the case the conclusion would not follow because neither such petition for, nor such order allowing the appeal was necessary. In this case it was allowed generally without regard to either. There was an approval of a *general* bond for the appeal (Rec., pp. 44, 45) which was *not* limited to jurisdictional questions. This was followed by citations (Rec., pp. 47, 49) signed by the judge, the service of which all parties unconditionally accepted (id.). These citations were *general* in their nature, requiring each appellee—

> "to show cause, if any there be, why the decree rendered against said appellants as in the said order allowing the appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf."

These citations were unnecessary, so far as concerns the Secretary of the Interior, and McCurtain, the representative of the Choctaws, because as shown by the record in the clerk's office, their general appearances were entered upon the clerk's printed form. These general appearances obviated the necessity of citations. The other appellees have filed no briefs, are taking no part in the case, and have made no motion to dismiss. As already shown (Orig. Brief, p. 31) by the act of March 3, 1909, Congress directed the Attorney-General to move the advancement of the case here, which, being done, met with no opposition and with a ready response from the court. These views find support in Sage *vs.* Central R. R. Co., 96 U. S., 712, 24 L. Ed., 641, 643, where Mr. Chief Justice Waite said:

> "The statute makes no provision in terms for the form of the allowance of an appeal (R. S., sec. 692); but as there can be no appeal without the taking of security, either for costs or costs and damages,

> and this is to be done by the court or a judge or justice, the acceptance of the security, if followed *when necessary* by the signing of a citation, is, *in legal effect the allowance of an appeal.*"

This doctrine has been repeatedly stated (Draper *vs.* Davis, 102 U. S., 370, 26 L. Ed., 321, 122; Brandies *vs.* Cochrane, 105 U. S., 262, 26 L. Ed., 989; Brown *vs.* McConnell, 124 U. S., 489, 31 L. Ed., 492, 496, 497; Stewart *vs.* Masterson, 124 U. S., 493, 31 L. Ed., 507; In re McKenzie, 180 U. S., 536, 546, 45 L. Ed., 657, 662; Louisville Trust Company *vs.* Stockton, 18 C. C. A., 408, 72 Fed. Rep., 1; Alaskan United Gold Mining Co. *vs.* Keating, 53 C. C. A., 655, 116 Fed. Rep., 561, 565).

It may therefore be assumed that the approval of a bond, without more, operated as a sufficient order allowing the appeal, for *all* purposes, as against the appellees now appearing and with the issue of the citation so operated as against the non-appearing appellees. The formal order (Rec., p. 42) allowing the appeal upon jurisdictional questions only was merely intended as the certificate, which, under the act of 1891, is necessary *when there is a question of jurisdiction of the Federal courts as such* and the case is not otherwise directly appealable. When otherwise appealable, the trial judge can not limit the appeal to particular questions nor control the jurisdiction of this court, which must for itself take such jurisdiction as the law gives it when an appeal is perfected by the approval of the bond and signing of the citation.

(*e*) The petition for appeal and order granting the same were evidently prepared upon the theory that the decree below was based upon the proposition that no court, upon the facts alleged, could grant appellants relief. The mistaken notion was adopted that this made a *jurisdictional* question necessary to be certified in order to bring the case here. However, the jurisdictional

question thus mentioned and to which the petition and the order purported to be limited was not to that of the Federal courts as such but went to the *entire* merits of the case, not, as assumed by counsel, to the kind of a jurisdictional question necessary to be certified. In plain words, the appellants and the judge below, both intended to have reviewed the case actually there tried. So when they referred to the "jurisdictional question," they meant the case as presented by the bill and actually decided below. It is not material whether this technically presents a jurisdictional question. Those words were below used in that sense. This is perfectly plain. The bill (Rec., pp. 1, 23) was based upon the theory that, under a treaty and the statutes, appellants had vested rights in trust property then in the course of administration by public officials. A demurrer (Rec., p. 26) was interposed which, as three of the four grounds thereof, why the bill was insufficient, states:

> "Second. Because the matters named in the bill are matters of administration *which can not be* taken away from the executive department of the Government and *reviewed by the courts;*
>
> Third. Because it appears from the bill that all of the acts complained of by the complainant *were done and committed by the executive department of the Government and its agencies,* acting under the laws of Congress, all of which laws have been upheld and sustained by the Supreme Court of the United States;
>
> Fourth. *Because this court has no jurisdiction over the subject-matter of this suit.*"

The Secretary of Interior filed a paper (Rec., p. 27) averring "this court has no jurisdiction of the subject-matter set forth in the bill of complaint herein filed" which the court below (Rec., p. 31) says was "in the nature of a demurrer to the jurisdiction of this court of the subject-matter set forth in the bill." The trial judge

in an opinion (Rec., pp. 28, 40) held that the appellants had no vested rights, wherefore the question became one of a political nature into which the court could not inquire. The opinion (Rec., p. 40) so shows by thus concluding:

> "In the case at bar we have held that the right of any individual to share in lands and moneys in controversy, except as to freedmen for whom special provision is made, depends upon his membership in either the Choctaw or Chickasaw tribe or nation. The determination of his question of membership rests *solely* with Congress and such agencies as it may employ. Congress has provided that the evidence of such membership shall be the tribal rolls, as finally approved by the Secretary of the Interior. The bill discloses that the Secretary has acted in the matter and that complainants have been excluded from the rolls. In the light of the foregoing authorities in the opinion of this court, that action, *so far as this court is concerned is final and can not be reviewed here.* If the Secretary has erred to the injury of complainants, then appeal, if any, is to Congress and *not to the courts.* The demurrer to the jurisdiction must, *therefore*, be sustained and the bill dismissed, and it is so ordered."

In the order (Rec., p. 42) granting the appeal the judge recited that the appeal—

> "having been dismissed by decree of this court on the *sole* ground that the court had no jurisdiction of the action, . . . it is now ordered . . . that the appeal be allowed on that question only, ..."

This referred not to the jurisdiction of the Federal court as such, but to all the questions presented by the bill and decided below. This constituted the entire merits of the case, which was the jurisdiction as that

word was used in the opinion. This is made plainer by the further recital in the order—

> "that the *entire record and proceedings and papers* upon which said order and decree was made, *be included in the record on appeal.*"

In an additional order (Rec., pp. 45, 46) the judge below filed a certificate specifying the papers to be included in the record. In this he recited that the appeal was from a decree of dismissal based upon these explicit grounds:

> "(1) That complainants had no vested rights under certain treaties with the United States in and to the property in controversy.
>
> "(2) That certain provisions of certain acts of Congress denying to certain of complainants their alleged property rights were constitutional enactments.
>
> "(3) That the said court was without jurisdiction to entertain said suit brought by certain private parties, citizens of the United States, as complainants, against other private parties, also citizens of the United States, as respondents, for the purpose of determining property rights, acquired under and by virtue of certain treaties with the United States, or to determine the constitutionality of certain acts of Congress affecting the property in controversy, or to review the acts of the Secretary of the Interior, after his jurisdiction had ceased and terminated, for the purpose of ascertaining and determining whether the acts complained of were according to law, because the matters and things sought to have said court determine were political in their nature and not cognizable by a court of equity, upon which grounds said court entered a final decree dismissing said action for want of jurisdiction; and such appeal having, by order of this court, been granted on said grounds, and the further order made

> therein that the entire record and proceedings and papers upon which said decree was made be included in the record on appeal to the Supreme Court of the United States."

It is therefore apparent that when the trial judge stated that he allowed an appeal upon the "jurisdictional" question, he meant upon the propositions decided by him, which constituted the entire merits of the case, although he *called* them jurisdictional. To review these questions he granted an appeal. If by his order he could have limited this court to deciding what are technically jurisdictional questions, he has not so done nor even attempted to do.

The petition for appeal (Rec., p. 41) leaves no doubt upon this subject because it, like the certificate of the trial judge as to the papers, which were to be sent here, set out the *precise* ground of the decision below, which was that appellants having no vested interest under the treaties and legislative acts, only had political rights upon account of which no relief would be granted by any court. This petition was reinforced by an assignment of errors (Rec., pp. 42, 44) setting forth in detail each proposition passed upon by the court below and considered here in appellants' argument. The petition then asked "an order granting the appeal from said final decree denying the jurisdiction *as aforesaid*," i. e., as the court below used the word "jurisdiction." To determine what was so meant it is proper to look into, as has been done, the opinion, certificate, petition for appeal, and assignment of errors.

> Chicago *vs.* Mills, 204 U. S., 321, 326, 51 L. Ed., 504, 508.

(*f*) But if wrong in the foregoing suggestions, still the defect, if any, has been fully waived. If not, there is still ample power to grant a new appeal or make an order, if nec-

essary, amending the record by striking from the petition for, and from the order allowing the appeal, the limitation to a jurisdictional question (Rev. Stat., sec. 1005, 1012; Alaskan Mining Co. *vs.* Keating, 53 C. C. A., 65, 116 Fed. Rep., 561). No more formal application need be here made, for this court may, as it frequently does, treat the amendment as having actually been made. (Shaw *vs.* Merchant's Nat. Bank, 101 U. S., 557, 25 L. Ed., 893, 895). No harm could come to appellees from so doing because Ligon *vs.* Johnston, 164 Fed. Rep., 670, decided the questions here involved and is pending here upon appeal as No. 541. Congress, by solemn act, has asked the advancement of *this* case. The questions involved are of great public importance. The decree (Rec., p. 40) was entered August 24, 1908. The time for appeal does not expire (Rev. Stat., sec. 1008) until two years from that date. If this appeal be now dismissed another can be allowed and can be heard upon the same record. Therefore no great good could come from giving serious consideration to the suggestion that this court can not entertain jurisdiction.

II.

The Treaty of 1830 Did Not Merely Perfect the Terms of That of 1820, But Made Radical Changes in the Relations of the Parties.

1. The suggestion is made that the treaty of 1830 only confirmed, but did not change, that of 1820. Nothing is further from the facts. The first treaty with the Choctaws was made in 1786 (7 Stat., 21). Article 3 thereof provided for the allotment of land in Mississippi "to the Choctaw Nation to live and hunt upon," language which could not be distorted into an absolute grant but made the lands national in character. In this respect this treaty was not prior to 1820 changed, though it was in

some other respects amended in 1801 (7 Stat., 66), 1802 (7 Stat., 73), 1803 (7 Stat., 80), 1805 (7 Stat., 98), and 1816 (7 Stat., 150, 152).

(*a*) From the very inception of the Government its policy was to bring about the extinguishment of the Indian tribes, by the civilization of the Indians, the allotment of land in severalty to them in fee and their absorption into the citizenship of the Republic (Orig. Brief, page 45). President Madison makes this plain in his eighth annual message to Congress under date of December 3, 1816 (vol. 1, Messages and Papers of the Presidents, 573, 575, 576), wherein he says:

> "I am happy to add that the tranquillity which has been restored among the tribes themselves, as well as between them and their own population, will favor the resumption of the work of civilization which had made an encouraging progress among some of the tribes, and that the facility is increasing for extending that divided and *individual ownership*, which exists now in movable property only, to the *soil itself*, and of thus establishing in the culture and improvement of it the true foundation for a transit from the habits of the savage to the arts and comfort of social life." . . .

(*b*) Finally in 1820 the white settlers had encroached upon the reservation, troubles beset the tribes, dissatisfaction was created and the Government in response to the demand of the people of the State, undertook to arrange for a removal of a portion of the Choctaws to the country west of the Mississippi River. There was by Generals Jackson and Hinds negotiated with them the treaty of October 18, 1820 (7 Stat., 210), by which the Choctaw Nation ceded to the United States *a portion only* of their Mississippi lands, out of which fifty-four sections were to be sold and the proceeds of sale used as school funds. A section of land was to be secured

(art. 9) to each Indian who remained in Mississippi. Provision was made for an annuity of $6,000 a year "to remain in the nation" for twenty years under the treaty of October 24, 1816 (7 Stat., 152) a part of which had, prior to 1820, been misappropriated. The United States upon the other hand, did "cede to said nation" (art. 2) the land west of the Mississippi River to which it was contemplated (art. 9) there should be removed in one year such portion of the Choctaws only *as lived by hunting*, one of the objects of the treaty, as indicated by its preamble, being to provide the land west of the Mississippi River for those Indians only who lived by hunting, leaving still undivided, land in Mississippi for division (art. 4) among those who desired to remain, and expected thereafter to become civilized, enlightened citizens.

In 1830 none of the Choctaws had removed. General Jackson in the meantime became President and his interest in the Choctaws is explained by what transpired during the Creek war of 1813 and 1814 in which the Cherokees and Seminoles joined with the Creeks in open rebellion against the Government under the leadership of Tecumseh, who, it is claimed by historians, was in the employ of the British government (Halbert and Ball History Creek War, p. 40). The Choctaws, under the leadership of Pushmataha, the chief of the Southern district of the Choctaw Nation, rendered great assistance to the Federal Government. Pushmataha, who was commissioned a lieutenant-colonel in the United States Army (General Claiborn's division, Jackson's army), raised four companies, which were regularly mustered into the United States Army, all officered by Choctaws (Halbert and Ball His. Creek War, chap. 14, p. 211). It was Pushmataha and his Choctaw soldiers that preserved the property of the white citizens in the Mississippi territory and ultimately terminated the war (id). This act of friendship for the Government inspired and secured

General Jackson's lasting friendship for the Choctaws, and it is to this that the full bloods refer in their protest (Orig. Brief, p. 55). In this we find an explanation of the great interest General Jackson took in negotiating the treaty of 1830 and his desire to limit the property rights to the blood Choctaws, and particularly an explanation of the express provision that the grant was to be a *special grant*, thus distinguishing it from the other grants to Indian tribes to be made under the general act of May 28, 1830, in conformity with which the Creeks, Seminoles, and Cherokees subsequently received their grants.

In 1830, shortly after General Jackson became President, a spirited controversy arose between the full bloods who opposed, and the half-breeds who were proposing a new treaty. The United States claimed (Orig. Brief, pp. 59, 60) that the Choctaws had lost their rights by their failure to remove, but offered to give them the privilege of going west, or remaining in Mississippi and giving up the western land ceded by the treaty of 1820. The form of treaty *proposed* by the half-breeds (Orig. Brief, pp. 53, 54) provided for a title to the "Choctaw Nation, their descendants and citizens," which would have ensured the benefits thereof, not only to blood descendants, but also to adopted and intermarried white people, if thereafter permitted to become citizens. A most vigorous protest was made (Orig. Brief, pp. 54, 55) by the full-bloods, in which President Jackson's friend Pushmataha, late lieutenant-colonel in Jackson's army, joined. President Jackson, one of the commissioners who negotiated the treaty of 1820, then prepared a draft (id. 54) leaving out the words "citizens" thus depriving intermarried and adopted whites of the benefits of the title, but leaving t to those of Indian blood. The proposed treaty drafted iby the half-breeds having been rejected, negotiations then ensued wherein the President (id. 57, 58), assured

the Choctaws that the title should go "to you and your children." The records recite that at a conference among the Indians "alterations and additions were made to the terms proposed" (id. 62). These alterations, as shown (id. 62) by the original document, were: In article 1 there was interlined the repeal of everything in former treaties inconsistent with that then proposed. In article 2, which provided for a patent to the Choctaw Nation only, there were interlined the words "*in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it.*" It is therefore certain that it was intended to limit the rights in this land to the Indians and their descendants and to exclude the white and adopted citizens who might then be or thereafter become located in the nation.

3. The treaty of 1830 (7 Stat., 333) was then adopted, providing for a *special* grant to the Choctaw Nation in fee simple to them and their descendants (art. 2). So the grant was to be of *special* character and not a general grant. If the title had to go to the nation as such it was absolutely unnecessary to use the word "them," which indicated the then members or that of "descendants," indicating those of the blood. The treaty of 1830 provided that all, instead of a part, of the Mississippi land was ceded. Instead of those going who desired to live by hunting, one-half of all the Choctaws were to move in 1831 and 1832, and the balance in 1833 (art. 3) with the exception that any member could within six months, by so indicating his desire, actually become a citizen of Mississippi (art. 14) and be permitted to there remain. Certain specific reservations of land in fee were made to certain individuals (arts. 15, 19). The Mississippi lands so ceded were to stand as security for all dues under this and former treaties (art. 18). Provision was made that all intruders should be excluded and

that any violation of law by a white man should become subject to punishment (art. 12). All States and Territories were prohibited from passing any laws to govern the Choctaws or their descendants (art. 4) and no part of the land granted to *them* could be embraced in any state or territory (id.), private property, was always to be protected and never taken by the public without compensation to the *owner* (art. 12). It is significant that the marked changes adopted by the treaty of 1830 in the relations of the Indians were made under the direction of President Jackson, who as a commissioner had negotiated the treaty of 1820. Title which had formerly been offered to the nation for hunting purposes only became absolutely and unconditionally the subject of a *special* grant to that nation in "fee simple to them and their descendants" who were (art. 4) protected from the inclusion of the land in or being governed by the laws of any future state or territory. This was in line with the efforts of the President to protect those of the blood and the act of June 30, 1834 (4 Stat., 730), forbidding settlement upon the lands by the white people. It was provided as a final protection (art. 18) that the treaty should *"be construed most favorably toward the Choctaws."*

III.

The Treaties of 1855 and 1866 Could Not and Did Not Deprive Appellants of Their Rights Under the Treaty of 1830.

1. It is seriously argued that the treaties of 1855 (11 Stat., 611), and April 28, 1866 (4 Stat., 769), changed the treaty of 1830, or at least was a recognition by the Government and the nations that no interest had been vested by the treaty of 1830. This subject has already been considered (Orig. Brief, pp. 96–113). Manifestly if

rights were vested in 1830 no subsequent treaty could change them (id. 97, 98). Certainly no action or construction by the nations (id. 104) could determine who were descendants of former members. The treaty of 1855 intended (id. 98, 99) to confirm and establish a vested interest in "the members, . . . their heirs and successors," which language should be (id. 98, 99) read as "*them and their descendants.*" Certain it is that it was never intended by the treaty of 1855 to vest title in the nation irrespective of the rights of individuals. The words "heirs and successors" were simply borrowed from the act of May 28, 1830 (4 Stat., 411), and were not inserted to lessen the interest of the blood Indian. Never having been so intended, they ought not to be so construed.

2. In treating with the Chickasaws, in the treaty of 1837, the Government expressly stated that it had no interest in the property, and that it was *owned* by the Choctaws (Orig. Brief, pp. 65–70). The language of the patent (id. 85) clearly shows that the officers who executed it used words by which they construed the treaty in accordance with appellants' contention. It is not suggested that prior to the treaty of 1855 any different construction was placed upon it. Article 7, of the treaty of 1855, however, provided for the exclusion of all persons "who are not by birth, adoption, or otherwise citizens or members," thus implying only, and for the first time, that membership in the tribe might be acquired by the whites by intermarriage and adoption. But the provision thus made had no relation to the question of the acquisition of property rights. If however, the language was used to permit the acquisition of a title it was artful and deceptive. If so, it possibly was the beginning of those corrupt frauds of the whites to appropriate the property of the Indians as described (Orig. Brief, pp. 113–127) by Congressional committees.

3. It is true that the treaty of April 28, 1866 (14 Stat., 769), contemplated dissolution and allotments of lands which plan was never carried out. For that reason it throws (Orig. Brief, 107, 113) no light upon the question under consideration. Some one, possibly an artful adopted or intermarried white, contemplating the frauds afterwards practiced, saw to the insertion of article 26, reading:

> "The right here given to the Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations or who may hereafter become such."

Articles 10 and 45 reaffirmed and recognized appellants' rights as given by the treaty of 1830 by thus providing, article 10:

> "The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six."

Article 45:

> "All the rights, privileges, and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty."

It is significant that up to this time no effort had ever been made to exclude those of the blood, nor did

this treaty purport to do so. The most that was sought was to put adopted citizens on a political plane with those of the blood. The matter is wholly immaterial, because the plan contemplated by the treaty was never consummated or carried out. It was not until later that any person was seized with the idea that there could be a total exclusion of those who were descendants by blood of those who were members at the time of the treaty of 1830.

IV.

Congress Never Intended to Exclude Appellants.

This question has been (Orig. Brief, pp. 113, 127) fully considered. The Dawes Commission was (id. 135) directed to enroll "citizens by blood." References were made (id. 140) to the treaty of 1830, and provision made (id. 139) that nothing in the act should affect vested interests. Treaty rights were frequently referred to. Notwithstanding all these efforts on the part of the law-making branch of the Government, what was done was to *exclude* entirely thirteen thousand blood Indians from the benefit of the property, even from sharing with others. This, too, although their names appeared (id. 149, Rec., p. 10) upon the many tribal rolls used by the Government and nations for years as a basis for their dealings.

V.

Decisions Heretofore Made as to Rights Given by the Treaty of 1830.

1. In Ligon *vs.* Johnston, 164 Fed. Rep., 670, Judge Hook with the concurrence of Judges Sanborn and Adams held that the treaty of 1830 did not grant any vested interest. That decision is, however, not final because the case is now pending here upon appeal as No. 541, so

that this court must in this or that case ultimately decide the question.

2. In the same court (Schulthis *vs.* M'Dougall, 170 Fed. Rep., 529), Judge Amidon with the concurrence of Judges Hook and Riner, without referring to Ligon *vs.* Johnston (supra), held that the Creek Indians under their treaty had vested rights which absolutely accrued and could not be disturbed. It is impossible to reconcile these two cases, especially since the lands granted by the Creek treaty (7 Stat., 417) were "to the Creek Nation of Indians."

(3) The Supreme Court of Oklahoma (Godfrey *vs.* Iowa Land and Trust Co., 95 Pac. Rep., 792, 799, 800) pointed out the differences in the treaties of the Five Civilized Tribes, holding that the Seminoles had no vested interest, but expressly stating that "it is not to be inferred that the same rule applies to all the other nations of the Five Civilized Tribes." The differences in the treaties set forth in that opinion are that of the Cherokees (7 Stat. 478) had title by patent to "the Cherokee Nation," that of the Creeks (7 Stat., 417) provided for land to be conveyed by patent "to the Creek Nation," while that of the Seminoles (14 Stat., 722) provided for a grant "to the Seminole Nation." The language of the Choctaw grant was to cause "to be conveyed to the Choctaw Nation a tract of country . . . in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it."

VI.

Fraud, Bribery and Harsh and Unreasonable Rules and Regulations.

1. This case differs from Ligon *vs.* Johnston in that here there appear in the bill many allegations as to the arbitrary, unreasonable and improper conduct of the

administrative officers in making up the rolls and in making the allotments. Among other things it is charged:

(*a*) The attorneys of the nations, under regular salary, violated the duty which they owed their clients by taking employment for huge extra compensation to defeat the rights of certain individuals, who were then their clients, taking temporarily in their employ an administrative officer, charged with many official duties, who was thus called upon to inconsistently serve two masters. Of his conduct after investigation, William D. Foulke, Special Representative of the President (Sen. Doc. 357, 59th Cong., 2d. Ses., 158) reported:

> "In the Beall investigation I refer respectfully to my report, pages 8, 9, 10, and 11. These are matters which incidentally relate to the conduct of Mr. Bixby, as well as of Mr. Beall, which I think ought to be brought to your notice, and an explanation requested from Mr. Bixby. Mr. Bixby knew that Mr. Beall had been employed by the firm of Mansfield, McMurray & Cornish; that while in their employ he had been working upon certain cases pending in the Choctaw and Chickasaw citizenship court; that these cases were afterwards brought into the commission; that Mr. Beall initialed them and passed upon them 'to a certain degree,' as he testifies. In point of fact, Mr. Beall passed upon some of them in a judicial capacity, which was highly improper. If Mr. Bixby did not know it, he ought to have known it, and have prevented Mr. Beall from taking any part with regard to them."

(*b*) There was actual bribery of two members of the citizenship court with part of the $750,000 paid the attorneys for their fee.

(*c*) Arbitrary and unreasonable rules were adopted and regulations so made that it was an actual and physical impossibility for the Secretary of the Interior to intelligently and properly perform his duty in finally

approving the rolls and for appellants to have their claims considered.

2. It is contended that all this is immaterial because the law makes the action of the Secretary final. If this were true, all such matters are, at least, proper considerations in dealing with the contention that both the nations and the Government, by their action have practically construed the rights of appellants as non-existent. In view of the corrupt and brazen attempts by the whites (Orig. Brief, pp. 113–127) to take the property of these Indians no practical or departmental construction should have any force and effect. Otherwise a premium would be put upon wrongdoing. For this reason alone the allegations of the bill in this respect are material and the court should, upon this record, treat with scant consideration the alleged practical construction. A construction obtained by fraud and bribery and by harsh regulations to prevent the assertion of rights should not be commended by a court of equity.

3. When the law made the decision of the Secretary final it only meant so far as concerned the Department and not as against actions in the courts (Johnston *vs.* Towsley, 13 Wall., 72, 20 L. Ed., 483) for fraud, mistake, and corruption. Here, however, the decision of the Citizenship Court was final and could not be reviewed by the Secretary (32 Stat., 641, sec. 33). If therefore, the judges of that court were bribed, inquiry can be made of that fact in any subsequent judicial proceedings.

VII.

As to Effect of United States and the Indian Nations Not Being Parties.

1. It is suggested that neither the United States nor the nations are parties to the bill. This, if material, was a matter in abatement and no such point was made below.

2. The United States can be sued with its consent or

it can voluntarily appear and intervene to which action appellants will always consent. It has already consented by asking in the act of March 3, 1899 (Orig. Brief, p. 31), for the advancement of this case.

3. Green McCurtain and Douglas H. Johnston are defendants as officers of the nation and as representatives of a class. That such class representation is proper was decided in Wallace *vs.* Adams, 204 U. S., 415, 425, 426, 51 L. Ed., 547, 552, 553.

4. The United States has no interest in the property itself. This is made plain in the act of 1906 (34 Stat., 143, secs. 16, 17). Its officers are making and are to make distribution to the individuals entitled thereto. If appellants have an interest they must have a part in the distribution, a denial of which by Government officers is the unconstitutional exercise of power against which courts relieve (Garfield *vs.* U. S., 211 U. S., 249, 264, 29 Sup. Ct. Rep., 62, 66), the suit not being regarded as one against the Government, any more than a like suit against State officers is a suit against a State (Ex Parte Young, 209 U. S., 123, 52 L. Ed., 714). The Indian nations have no longer an interest. Having been dissolved, the rights are individual (Worcester *vs.* Georgia, 6 Pet., 515, 8 L. Ed., 483, 502), and therefore neither nation nor Government is a necessary party, and this is expressly recognized by sections 16 and 17 of the act of April 26, 1906 (34 Stat., 143).

5. However, if these tribes still exist and it is necessary that they be made parties, by the Atoka agreement (30 Stat. L., 505, sec. 29), the nations consented to the institution of suits to determine all questions, the agreement among other things providing:

> "Whenever it shall appear to said court, at any stage in the hearing of any case, that the tribe is in any way interested in the subject-matter in

> controversy, it shall have power to summon in said tribe, and make the same a party to the suit and proceed therein in all respects as if such tribe were an original party thereto."

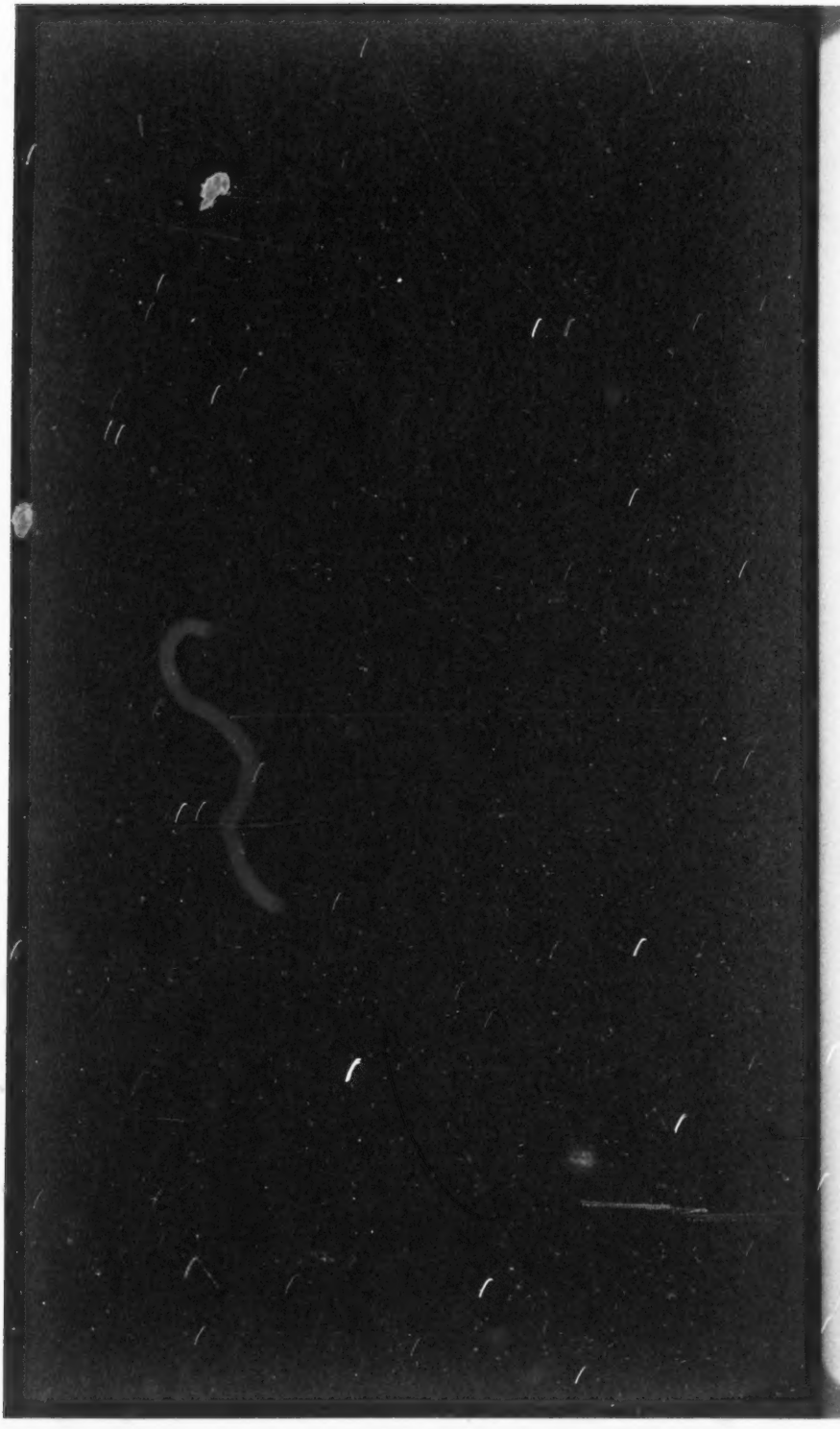
Section 2 of the act of June 28, 1898 (30 Stat. L., 495) provided:

> "That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said territory, it shall appear to the court that the property of, any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

The bill (Rec., p. 20), in express terms, asks the court to issue such summons and order such service. It was, in fact, made (Rec., pp. 24, 25), and was followed by a *general* appearance. The nations have heretofore consented to the suit.

Respectfully submitted.

JOHN G. CARLISLE,
FRANK HAGERMAN,
WEBSTER BALLINGER,
ALBERT J. LEE,
Solicitors for Appellants.



IN THE

Supreme Court

OF THE

United States

OCTOBER TERM 1908

J. E. FLEMING, ET AL.,

Appellants,

vs.

GREEN McCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD, ET AL.,

Appellees.

No. 535

Appeal From the Circuit Court of the United States for the Eastern District of Oklahoma.

BRIEF ON BEHALF OF GREEN McCURTAIN.

The appellants embody in the transcript of appeal the original complaint in equity, which is a full statement of the case.

The appellee, Green McCurtain, filed the following demurrer:

"First: Because there is no equity in the bill and because it does not state facts sufficient to entitle complainants to relief prayed for, or to any relief whatever;

"Second: Because the matters named in the bill are matters of administration which cannot be taken away from the executive department of the government and reviewed by the courts;

"Third: Because it appears from the bill that all of the acts complained of by the complainants were done and committed by the executive department of the Government and its agencies acting under the laws of Congress, all of which laws have been upheld and sustained by the Supreme Court of the United States;

Fourth: Because the Court has no jurisdiction of the subject matter of this suit."

The District Judge in an opinion which discussed all the issues presented by the complainants, after full consideration of the grounds for the relief sought, sustained the demurrer to the jurisdiction of the Court. The appellee contends that the judgment is correct and requests its affirmance for reasons hereinafter set forth:

1. The Courts have no jurisdiction of the subject-matter of the complaint for the reason that Congress has the exclusive power to administer and control tribal property of the Indians of the United States. This power is not subject to be controlled by the courts.

2. In addition to its general policy, Congress exercises a political and administrative power over the tribal

common property of the Indians of the United States, free from interference by the courts. In the **case of the Choctaw and Chickasaw Nations,** Congress from the earliest period in the history of these people dealt with them by treaties and by statutes in the administration of their common property, and when it was determined to end the tribal existence of the nations and to apportion the property among their constituent members, agreements, adopted by the votes of the members of the tribes, were enacted as the law of the land for this purpose by Congress, in the acts of June 28, 1898, and July 1, 1902, and the act of April 26, 1906, as supplementary in the execution of the trust agreed upon.

3. The lands and moneys of these tribes are public lands and public moneys and are not held in individual ownership. (Stephens v. Cherokee Nation, 174 U. S., 488; Cherokee Nation v. Hitchcock, 187 U. S., 294; Wallace v. Adams, 204 U. S., 415).

This proceeding is an attempt to interfere with and take from the control of the Secretary of the Interior the common property of the Choctaw and Chickasaw Nations. Congress in its political and administrative power had by statute invested the Secretary of the Interior with the duty of dividing the common property of the nations among their constituent members. The nations by a majority vote had ratified an agreement

with the United States that this should be done in the manner provided by the statutes enacted upon the subject-matter.

The Secretary of the Interior is the official of the United States who has been invested by Congress with the power to administer and supervise the property of the Indians. (Holden v. Joy, 17 Wall., 231; DeCambra v. Rogers, 189 U. S., 121; West v. Hitchcock, 205 U. S., 80).

SOURCE OF TITLE.

As a preliminary to the discussion of the questions raised by the bill of complaint, it is well to give a brief history of the source of the title of the property owned by the Choctaw and Chickasaw nations and now in process of administration and division among its members.

The source of all Indian titles in the Indians is founded in the ancient right of occupancy in common, of the particular tribes, using a defined territory for the purpose of "living thereon and for hunting."

The various nations engaged in exploration and the acquisition of territory in the New World from the very beginning, insisted upon their exclusive right to deal with the natives. All admitted that the original inhabitants were the rightful occupants of the land, with a

legal as well as a just claim to use it to their discretion, subordinated to the control of the sovereigns, who asserted for themselves the ultimate fee with which no other European power could interfere. In the assumption of the right of appropriation by discovery, wars were fought which employed armies on many sanguinary fields in Europe and America. These were concluded by treaties defining the areas of proprietary rights of the various European nations.

In the discussions respecting boundaries between France, Great Britain and Spain, all claimed their rights to ownership of the land, on the right of discovery, and each respected the rights of the original inhabitants. It became a recognized principle followed by these nations, that the sovereign alone had the power to deal with the natives, that all grants were made subject to the Indian right of occupancy, that the only power that could extinguish the Indian title was the government itself.

The United States or the several States as the legal successor to the Crown of Great Britain received a clear title to all the lands described in the treaty at the conclusion of the Revolutionary War. This was clearly stated in Johnson and Graham's lessee v. McIntosh, (8 Wheaton, 588):

"The British Government, * * * whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave them. These claims have been maintained and established as far west as the River Mississippi, by the sword."

Chief Justice in Chisholm v. Georgia (2 Dallas, 470), says:

"Every acre of land in this country was then held mediately or immediately by grant from the Crown of Great Britain."

Chief Justice Marshall, in Cherokee Nation v. State of Georgia (5 Peters, 1), asserts the principle that the United States, having succeeded to the government of Great Britain, became vested with the ultimate fee in the soil of all territory occupied by the Indians and with the exclusive right to extinguish the Indian title. The Chief Justice in describing the position of the Indians in the United States, says:

"They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage * * *. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants."

This statement has been repeatedly emphasized and adhered to by the Supreme Court of the United States

in cases involving the interpretation of treaties with the Indians and statutes dealing with their rights. (United States v. Kagama, 118 U. S., 375; United States v. Rickerts, 188 U. S., 432).

The courts have no jurisdiction of the subject-matter of the complaint for the reason that Congress has the exclusive power to administer and control the tribal property of the Indians of the United States. This power is not subject to be controlled by the Courts.

The framers of the Constitution of the United States gave exclusive control of Indian affairs to Congress. They recognized the Indians as a separate people. They specifically excluded them from the right to vote, exempted them from taxation, and from the operation of the laws of the various States. No Indian was entitled to citizenship, although born within the territorial limits of the United States, unless that right had been expressly conferred by treaty or statute. This is clearly illustrated in the case of Elk v. Wilkins (112 U. S., 94). Congress alone being invested by the Constitution with the treaty-making power, all matters affecting Indians were directly committed thereby to its sole and exclusive power. The United States dealt with the Indian tribes continuously until 1871, by treaties only.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States and provide that all intercourse with

them shall be carried on exclusively by the Government of the Union.

* * * * * * * * * *

The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. Worcester v. Georgia (6 Peters, 515).

Indian treaties are the supreme law of the land unless expressly and definitely abrogated. Fellows v. Blacksmith, et al., (19 Howard, 366); U. S. v. Kagama, (118 U. S., 375).

By the acts of 1802 (Sec. 12, 2 Stat., p. 143), and 1834 (Sec. 12, 4 Stat., p. 730), it was provided:

"That no purchase, grant, lease or other conveyance of lands, or of any tribe or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution:"

In Worcester v. Georgia (6 Peters, 593), Mr. Justice McLean said:

"It will scarcely be doubted by anyone, that, so far as the Indians, as distinct communities, have formed a connection with the Federal Government, by treaties; that such connection is political and is equally binding on both parties.

So long as treaties and laws remain in full force, and apply to Indian nations exercising the right of self-government, within the limits of a State, the Judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them."

In United States v. Holliday (3 Wallace, 419), the Court said, in determining the attitude of the Government toward Indians:

"It is the rule of this Court to follow the action of the executive and other political departments of the Government whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress."

In Cherokee Nation v. Hitchcock (187 U. S., 294, p. 308), the Court said:

"The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

In Lone Wolf v. Hitchcock (187 U. S., 553, p. 565), the Court said:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

The history of the relations between the Choctaw

and Chickasaw Nations in theUnited States begins with the treaties with both in 1786. The boundaries of the lands allotted to these nations for their exclusive use "to live and hunt on" are defined in those treaties. (Kapler's Treaties, pp. 11-14). The rapid settlement of the territory by the white race surrounding these nations produced constant friction due to racial differences. The Indians cultivated but little land, simply sufficient for their simple wants, and the vast area of fertile soil covered by forests was practically unoccupied.

The four tribes known as "civilized tribes" composed of the Cherokee, Creek, Choctaw and Chickasaw Nations, occupied the country then parts of the States of Georgia, Alabama, Mississippi, North Carolina, Tennessee and Kentucky. The Cherokee Nation in Georgia became the source of discussion as to the relative rights of the States, the United States, and the legal standing of the Indian Tribes. The Cherokee Nation had a regular organized government under which they administered all their domestic affairs. They claimed absolute sovereignty over persons and property within the limits of their territory, insisting upon their independence, and immunity from State and national control, except as provided for by their treaty engagements with the United States. The people of Georgia, realizing the difficulties that would grow out of their proximity to these people,

in 1802 ceded to the United States all the lands occupied by the Cherokees and the other tribes whose boundaries extended to the Mississippi River. In that cession, the State insisted that the United States should extinguish the Indian title at an early date. The States of Alabama and Mississippi were carved out of the western area of lands claimed by Georgia. Alabama admitted 1819; Mississippi admitted 1817. After waiting for thirty years for the United States to extinguish the Indian titles and seeing no effort made by the United States Government in that direction the people of these several States enacted laws with a view of subjecting the territory occupied by these tribes to State control, and asserted the ownership of the State to the lands. The laws were harsh and oppressive. They conferred no right of suffrage upon the Indian, and gave him no voice whatever in the government, declaring null and void any contract made with an Indian, and provided that no testimony of an Indian could be received by any court in a controversy between an Indian and a white person.

The discovery of gold in northern Georgia caused an immense invasion of the Cherokee country by the whites. The Governor of the State was authorized by the legislature to take charge of the mines, to remove trespassers, to furnish a military guard for the surveyors who were sent into the Indian country to survey the lands with a

view to their sale. This was a direct violation of the treaty by the United States with the Cherokees.

No white person was permitted to reside among the Indians without a license from the State of Georgia, and when the Indians appealed to the military commander of the United States, they were informed so far from protecting them, "he would aid the civil officers of the state in enforcing their laws." An appeal to the President of the United States brought the reply that "the President of the United States had no power to protect them against the laws of Georgia."

Similar laws were passed by the States of Alabama and Mississippi, which affected the Choctaw and Chickasaw Nations. These occurrences caused the Cherokee Nation to enter a suit in the Supreme Court of the United States (Cherokee Nation v. State of Georgia, 5 Peters, 1), in which the Cherokee Nation stood upon their treaty rights as a nation, complained of the annulment of their laws, and the assertion by the State of Georgia of absolute control over them as a people, and of the attempt on the part of the State to assert their ownership of the Cherokee territory as public property. Chief Justice Marshall delivered the opinion in this case in which he fully discusses the relation of the Indian tribes to the United States Government, and maintained that by Section 8 of Art. 3 of the Constitution of the United

States, the Congress of the United States alone has the power to control Indian affairs, that the Indian nations **have the right of self-government with which neither the States, nor the courts of the United States can interfere, that the Indian tribes are separate, dependent nations** in a state of pupilage and their relation to the United States resembles that of a ward to his guardian.

In the case of Worcester v. State of Georgia (6 Peters, 515), which was an appeal from the Georgia courts condemning him to an infamous punishment, he having lived as a Presbyterian missionary in the Cherokee nation without a license from the State of Georgia, the Supreme Court of the United States held that the laws of Georgia, which sought to subject the Indians to the control of their State laws, were "repugnant to the Constitution, treaties, and laws, of the United States and so void," and the judgment against the plaintiff in error under color of the Georgia law was reversed, and the assertion of jurisdiction over the Cherokee nation by the State of Georgia, was extra-territorial. These two decisions were respectively rendered in 1831 and 1832. In 1830 the Choctaw nation located in Mississippi, being subjected to the same difficulties as their brethren in Georgia by reason of the obnoxious laws of Mississippi similar in character to those of Georgia, memoralized the Government of the United States in the following:

"Whereas, The Choctaw Nation of Red People have always lived under such laws as were judged and admitted in their National Councils to be just and equitable, and suited to freemen; and

"Whereas, The General Assembly of the State of Mississippi has extended the laws of said state to all persons and property within the chartered limits of said state; and the President of the United States has expressly told us that he cannot protect the Choctaw people from the exercise of Mississippi law, but that he will be under the necessity of sustaining said state in the exercise of her laws;

"NOW, THEREFORE, We, the Choctaw Nation of Red People, In National Council assembled, have determined that we never will submit to, or be governed by laws in the enactment of which we are not permitted to participate, and as the constitution of the state of Mississippi does not secure the representation of Red people, in the legislative council of said State, and that we may continue under our own laws in peace with the United States and the State of Mississippi, we have determined to propose to sell our claim to lands east of the Mississippi River, and emigrate to the Choctaw lands west of said river, and on the following conditions:"

On May 28, 1830, Congress appropriated $500,000, a very large sum in those days, to bear the expenses of treaties and the removal of the Indians west of the Mississippi. The Choctaw nation realized that it would be impossible to live in peace with the white people, and although deeply attached to their homes, reluctantly concluded the treaty of Dancing Rabbit, September 27, 1830, which was ratified by the Senate of the United States, February 24, 1831, and the terms contained the title of

the Choctaw nation to the lands now being administered and partitioned among the Choctaw and Chickasaw people by the Secretary of the Interior under the direction of Congress. By the treaty of 1830, the tribe, with few exceptions, removed to the lands west of the Mississippi as described in the patent. They organized their independent governments by adopting constitutions modeled on that of the United States, which contained the legislative, judicial and executive machinery of government, under which they administered their affairs free and independent until 1898. Such Indians as did not remove were provided for by the issuance of a patent to particular quantities of land and they became subject to the laws of the State of Mississippi.

THE PATENT.

"To all to whom these presents shall come, Greeting:

Whereas, by the second article of the treaty began and held at Dancing Rabbitt Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States, on the 24th day of February, 1831), by the commissioners on the part of the United States and the Mingoes, chiefs, captains, and warriors of the Choctaw Nation, on the part of said nation, it is provided that "The United States under a grant SPECIALLY to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation' a tract of country west of the Mississippi River, IN FEE SIMPLE TO THEM AND THEIR DESCENDANTS, to inure to them while they shall exist as a nation and live on it:

Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City, in the year 1825.

Now, Know Ye, That the United States of America in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation, the aforesaid "Tract of Country west of the Mississippi," to have and to hold the same, with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, AS INTENDED, "TO BE CONVEYED" by the aforesaid article, "IN FEE SIMPLE TO THEM AND THEIR DESCENDANTS TO INURE TO THEM while they shall exist as a nation and live on it" liable to no transfer or alienation except to the United States or with their consent. (Recorded vol. 1, p. 43, Gen. Land Office)."

By the treaties of 1832 and 1834, the Chickasaw nation, who bore a close and intimate relationship with the Choctaws, also residing in Mississippi at that time, agreed to remove west of the Mississippi and after having purchased an interest in the lands of the Choctaw nation, removed. They had advanced in general intelligence so that they eventually abolished the office of King, provided for a representative government and administered their domestic affairs independently of any legislation of the United States and not subject to interference by the courts as is shown by the decision in Roff v. Burney (168 U. S., 218).

This cause was decided in 1896 by the Supreme

Court of the United States, the court sustaining the provisions of the treaty of 1855 (11 Stat., 611-612), between the Choctaw and Chickasaw nations. Article 7 provides:

"In so far as may be compatible with the Constitution of the United States * * * the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective nits; excepting, however, all persons with their prope , who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe."

The decision supports Article 38 of the treaty with the same tribes April 28, 1866 (14 Stat., 769, 779), as binding on the United States with referencee to citizenship in the Chickasaw nation.

Every white person, who having married a Choctaw or Chickasaw Indian residing in the nations, or who has been adopted by the legislative tribes of the same, is to be deemed a member of said nations and subject to the laws of the nations. In the instant case, a white person had been adopted by resolution of the Chickasaw nation. The adoption into citizenship endowed the adopted person with as complete a property right in the common property of the nation as a native born. The court held that the action of the Chickasaw council in withdrawing citizenship from this adopted person was a valid exercise of its power and not subject to interference or review by the courts of the United States. This case throws a flood of light on the interpretation of the

grant of the land as construed by the nations and the United States. The nations treated the grant as a grant in common, and that it did not vest an absolute fee in the individual members.

Every treaty, in the course of the 68 years of the administration of this common property, emphasized the absolute control and dominion over the property by the constitued legally chosen representatives of the nations. The United States in all its supervision over, and in all its dealings with, these nations, recognized the nations, and treated the grant as a grant in common to be regulated, dealt with and disposed of, by their authorized representatives.

We find in this Choctaw patent, which is claimed to convey a fee simple to the persons composing the tribe, the words "to inure to them while they shall exist as a nation and live on it liable to no transfer or alienation, except to the United States or with their consent." Such a limitation in the case of an ordinary conveyance would be enforceable. This clause was a valid stipulation in the grant, was not meaningless, could not be stricken from it and had the very greatest reasons for its insertion, the reason of necessity, amply justified by the history of the Indian wards of the United States in their dealings with lands granted for the purpose of settling them on a particular piece of property and preserv-

ing it for them in common until they were capable of managing it, and as a safeguard against their improvidence and their becoming a common charge upon the country in which they dwelt.

By the treaty of 1837 between the Choctaw and Chickasaw tribes, which was confirmed by the United States, the Choctaw Nation parted with a large area of the lands included in the grant evidenced by the patent of 1842, to the Chickasaw Nation, and this sale and transfer was made, notwithstanding the grant to the Choctaw Nation and "their descendants." A new limitation was put upon the grant by the treaty of 1855 in the following language:

"To the members of the Choctaw and Chickasaw Tribes, their heirs and successors **to be held in common,** so that each and every member of either Tribe shall have an equal, undivided interest in the whole."

By the same treaty the Nations leased their lands west of the 98th Meridian to the United States for a specific purpose, that is, for the settlement of the Wichita and other tribes of Indians.

In 1893 by 27 Stat., 645, the President was authorized to appoint, by and with the advice and consent of the Senate, three commissioners to enter into negotiations with the Five Civilized Tribes for the purpose of the extinguishment of the national or tribal title to any

lands within that territory now held by any and all such nations, or tribes, either by cession of the same or some parts thereof to the United States or by allotment and division of the same in severalty among the Indians of such nations, or tribes, or by such other method as may be agreed upon between the several nations and tribes aforesaid or each of them with the United States, the express purpose being to enable the creation of a State which should embrace the lands within the Indian Territory. This commission is commonly styled the Dawes Commission. The Commission visited the Indian Territory and made a report May 7, 1894. In this report, among other things, the Commission says:

"Title to their lands is held by the tribe in trust for the people."

"This trust is not being properly executed" was further reported by this Commission, who gave it as its opinion that the determination of citizenship in the tribes should not be left to the absolute determination of the tribal authorities, but that the United States should assume responsibility for future conditions.

By the Act of June 10, 1896 (29 Stat., 321-339), the Commission was "authorized and directed to proceed at once to hear and determine the application of all persons who may apply for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled."

By the Act of June 7, 1897, the Commission was authorized to continue the work heretofore entrusted to

it, and an interpretation placed upon the words "rolls of citizenship" as used in the Act of June 10, 1896; and they "shall be construed to mean the last authenticated rolls of each tribe, which have been approved by the Council of the Nation, and the descendants of those appearing on such rolls and such additional names and their descendants as have been subsequently added either by the Council of such nation, or duly authorized courts thereof, or the Commission."

The continued efforts of the Dawes Commission induced the Choctaw and Chickasaw Nations to enter into negotiations with it for the purpose of ascertaining the persons who were really entitled to membership in the tribes and to provide for the partition of the common property among the members thereof. This culminated in the adoption of the Agreement which is in what is commonly known as the Curtis Act, June 28, 1898 (30 Stat., 495).

The Curtis Act was a comprehensive scheme which contained methods for ascertaining the persons entitled to membership in the tribe, the appraisement of the land of the nation in order to ascertain its value for the purposes of partition, the segregation of the mineral lands, asphalt, coal and timber, the surveying and platting of townsites where large bodies of white persons were then conducting the business of the country, persons who had

received the privilege of living in the Indian country by the Indian authorities, and a provision for the purpose of giving a preference right in the allotment to members of the tribes to the particular farms or homes upon which they dwelt.

The most difficult question in the entire scheme was to ascertain who were the members of the tribes and who were entitled to participate in the partition of the common property. The Dawes Commission were not only to make correct rolls of citizens by blood or by adoption, but were to eliminate from the tribal rolls such names as had been placed thereon by fraud or without authority of law. The Commission was also to make a correct roll of the Choctaw and Chickasaw freedmen under the treaty made in 1866, and for allotting to them 40 acres of land, including their present residences and improvements, to be held and used by them until their rights under said treaty should be determined in such manner as might be hereafter provided by Congress.

"The rolls so made when approved by the Secretary of the Interior shall be final and the persons whose names are found thereon with their descendants thereafter born to them with such persons as may intermarry according to tribal laws shall alone constitute the several tribes which they represent."

All tribal courts were abolished. By Act of June 10, 1896 (29 Stat., 321-339), appeals were provided for from

the decision of the Dawes Commission in the matter of enrollment to the United States courts in the Indian Territory. By Act of July 1, 1898 (30 Stat., 571-591), appeals were allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party in all citizenship cases involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands. Numerous appeals were prosecuted to the Supreme Court of the United States from the United States courts in the Indian Territory on questions of citizenship. In Stephens v. Cherokee Nation (174 U. S., 477), the Supreme Court of the United States held that—

"The United States court in the Indian Territory is a legislative court and was authorized to exercise jurisdiction in the citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect to these Indian tribes, and assuming Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort can not be questioned unless in violation of some prohibition of that instrument."

The opinion of Chief Justice Fuller is a review of the treaties, the interpretation and construction placed upon them by the Supreme Court of the United States and the legislation of Congress in the exercise of its plenary power over Indian affairs. This decision recognizes the validity of the Act of Congress creating the

Dawes Commission and fixing its duties and powers. It sustained the constitutionality of the Act of June 28, 1898.

It also declared—

"The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." (P. 488).

This disposes of appellants' contention in this case that the individual members had vested rights flowing from the patent in fee simple to the lands embraced in the grant.

The members of the Choctaw and Chickasaw Nations being dissatisfied with the judgments rendered by the United States courts in the Indian Territory on the question of citizenship, one among the chief reasons being that the nations were not sufficiently represented in the proceedings in the courts, a scond Agreement was entered into between the Choctaw and Chickasaw nations and the United States, which was adopted by the two tribes after a vote of the members of the tribes. This was enacted into law July 1, 1902 (32 Stat., 641). By this act a court was created called "The Citizenship Court," which court was vested with the right to try de novo all questions of citizenship which had been de-

termined by the United States courts. Congress deemed it necessary and desirable to establish this court for the purpose of doing justice to the nations, and enabling it to administer the estate of its wards in order to secure a final and correct conclusion in the matters intrusted to its care as the guardian of the Indians. The validity of the law providing for the Citizenship Court and the methods provided by Congress for the retrial of the questions of citizenship, and the validity of the methods of procedure adopted by the United States courts in the citizenship cases appealed thereto from the Dawes Commission, and for the review of such cases upon their merits by the citizenship courts, and their power to annul the judgments heretofore rendered by the United States courts in the Indian Territory, were considered in the case of United States ex parte Joins (191 U. S., 97), in a petition for a writ of prohibition, and a writ of certiorari in aid of the same to the members of the Citizenship Court of the Choctaw and Chickasaw Nations. The prohibition sought to prevent the certifying and delivering a copy of a decree of the Citizenship Court to the Dawes Commission annulling the former decree of the United States courts in the Indian Territory in citizenship matters. The Court denied the writ and dismissed the petition.

It is then clear that in Stephens v. Cherokee nation, the power of Congress to confer jurisdiction upon the

United States courts in the Indian Territory to review the decisions of the Dawes Commission on questions of enrollment of the citizen members of the Choctaw and Chickasaw nations was declared a valid exercise of the constitutional power of Congress, and so far as the act of 1898 and the acts of the Dawes Commission and the United States Courts for the Indian Territory in pursuance of the provisions of the declared purpose of Congress in that act relating to methods of enrollment, are final.

The constitutionality of the act of 1902, by which the acts of the Dawes Commission and the judgments rendered by the United States courts in the Indian Territory on appeal from said Commission in the matter of enrollment of citizens of the Choctaw and Chickasaw Nations, was assailed in the suit of Wallace v. Adams. In that suit Mrs. Ella Adams, who had been regularly enrolled by the Dawes Commission, had received a certificate of enrollment for herself and her minor children, and by virtue of the act of 1902, selected a tract of land in the Choctaw nation and received the certificate of allotment for the land she found then in possession of the defendant, who had been enrolled by a decree of the United States District Court, and was living on this tract selected by her for allotment, he having taken possession of the land immediately after his enrollment. The

judgment requiring the Dawes Commission to place the defendant upon the rolls of the Choctaw nation was annulled by the newly created Citizenship Court. The defendant determined to test the power of Congress to enact legislation whereby the Citizenship Court was empowered to annul the decisions of the United States District Court for the Indian Territory in matters of enrollment in the Choctaw and Chickasaw Nations. He contended that by virtue of his judgment he had a vested right which could not be disturbed and that Congress had no power to enact legislation which would again subject the judgment in his favor to review by another tribunal.

The Court of Appeals for the Eighth Circuit in the case of Wallace v. Adams (143 Fed. Rep., p. 716), analyzed and reviewed the contentions of the defendant and held—

"The judgments of citizenship rendered by the courts were conclusive upon the parties to them in the absence of subsequent legislation, but though final when rendered, they were voidable and reviewable by subsequent acts of Congress passed before allotments of land were made under them. The act of July 1, 1902, whereby a citizenship court was created and empowered to review the final judgments of courts of the United States under the act of June 10, 1896, which had been affirmed by the Supreme Court under the act of July 1, 1898, was constitutional and impregnable to the attacks of successful litigants who had secured allotments of lands before its passage."

The Supreme Court in affirming this judgment in Wallace v. Adams (204 U. S., p. 423), passing upon the claim made by Hill, that the decree in his favor by the United States Court for the Indian Territory, and which had been affirmed in the Stephens case by the Supreme Court, was not a finality beyond the power of Congress "to in any manner disturb," said:

"This decision established that no such vested right was created by the proceedings of the Dawes Commission or the judgment of the courts of the Indian Territory on appeal from the findings of the Commission has prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory, it could try another. The fact that the first provision was by an inquiry in a territorial court did not exhaust the power of Congress or preclude further investigation. The functions of the territorial courts in this respect were but little more than those of a commission. * * * Hence, the act of Congress of July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court and giving to it power to examine the judgments of the Indian Territory courts and determine whether they should not be annulled on account of irregularities was a valid exercise of power."

This then settles the constitutionality of the act of 1902 and the judgments rendered by the citizenship court by virtue of said act annulling the prior judgment by the United States Courts for the Indian Territory are res adjudicata.

The complainants in this case, some 14,000 in num-

ber, allege that a majority of them were bonafide residents of the Choctaw and Chickasaw nations on the 28th of June, 1898, that some among them were not residents of the nations at that time, that these non-residents were entitled to enrollment and that the provisions of the act of June 28, 1898, prohibiting the enrollment of persons who were not bona fide residents and prohibiting the distribution of any share of the property to them is unconstitutional, null and void.

They further insist that the act is unconstitutional, because the agreements of 1898 and 1902 were ratified by a majority vote of male members of the nations. They insist that the grant inured to all persons descendants of the original members living at the date of the treaty and therefore the women and children in these two nations should also have been permitted to vote upon the adoption of these Agreements. They further insist that intermarried citizens had no right to vote in said elections. They complain that no person, not even the male adult, was permitted to vote in the said elections, unless he had theretofore been recognized by the tribal authorities and enrolled on one of the tribal rolls prepared by persons pecuniarily interested in the division of the tribal property and was at the time of said election a bona fide resident of said nations, that said pretended agreements were never approved by com-

plainants, were never in truth and fact or in law ratified by a majority of the lawful owners of said property and are, therefore, unconstitutional, null and void." (Subdivision 11. Complainants' petition, p. 6, Tr.)

Complainants further charge fraud on the part of certain attorneys of the nations and subordinate officials of the Dawes Commission, and with reference to the Citizenship Court they allege "that said legislative commission (meaning the Citizenship Court) did not confine its inquiry into the rights of persons whose cases came before it for determination to the one question as to whether or not they were members of the designated class of persons mentioned in said treaty and grant, but pretended to determine the rights of said persons solely upon their rights to citizenship in said nations under the laws, customs and usages of the said nations." (From Complainants' petition, XII, p. 8, Tr.)

The complainants assume that there is no possible controversy about their being Choctaw and Chickasaw Indians, though the sole evidence to be considered is their own declaration. In their petition they assert themselves as members of the Choctaw and Chickasaw tribes, independent of any enrollment either by the representatives of the tribes in making up its rolls or under the express direction of Congress, and assuming that they are unquestionably and beyond controversy mem-

bers of the Choctaw and Chickasaw nations. They undertake to specify errors, mistakes and frauds committed by the tribal authorities and by the subordinates of the Dawes Commission, and the Commission itself and deny the right of the Secretary of the Interior to in any manner approve and decide finally, questions of enrollment and allotment. They especially assail the enrollment of, and allotment of lands to the Choctaw and Chickasaw freedmen, some 12,313 in number. (XIII, 9 Tr.)

They charge that the administrative officers by reason of an opinion rendered by an Assistant Attorney General in defiance of the Act of Congress and by the utter refusal to examine certain rolls, which they claim were in possession of the Secretary of the Treasury, denied them enrollment and thereby their right to participate in the division of the property.

They deny the right of the Secretary of the Interior to segregate the coal and asphalt lands, some 430,000 acres, for the purpose of a separate sale and the distribution of the proceeds to the enrolled members of the nations and declare that the patents ordered issued by Congress and signed by the governors of the nations and delivered to individual members of the tribes as evidence of their particular share in the common property, are without authority of law and pray for an injunction prohibiting the

Secretary of the Interior in the completion of his work. In fact, they desire to have the court annul all the acts of any person, commission, or executive officer who, under the statutes of Congress has performed any act in compliance with the expressed purpose of the nations and the Congress of the United States to divide this property in severalty among the legally constituted members thereof. They assign errors on the part of the court which denied their various contentions and these errors are contained in twelve assignments. (43 Tr.)

These assignments substantially allege error by the court in holding that the court was without jurisdiction to hear and determine this cause, notwithstanding "the rights claimed by complainants * * * were dependent upon the construction of treaties with the United States, by one of which treaties the property in controversy was granted." They assert error in the courts holding that the grant in fee simple of the property in controversy "did not confer upon the complainants such rights in the property as would entitle them to have their claims thereto determined by a court of equity." They charge error that the court held "that the Secretary of the Interior could construe complainants' rights secured to them under treaties of the United States and that construction thereof by the Secretary was final and not reviewable by a court of equity." They charge error in

the courts holding that the acts of the Secretary of the Interior in denying them their property rights and determining that other persons had property rights in this common property were not subject to a review by a court; they charge error in the courts holding that the Secretary had complete jurisdiction over the property in controversy, that his jurisdiction had not ceased or terminated and the property was still in the course of administration by the Secretary of the Interior.

CITIZENSHIP.

Until the Agreements of 1808 and 1902, Congress, by virtue of its treaty-making power, had dealt with the Choctaw and Chickasaw nations by treaties. It began in 1786 to recognize the absolute power of these nations to control their domestic affairs within the established boundaries of their country. It recognized their absolute jurisdiction over persons and property within their limits as completely as that of any other sovereign government, subject only to such legislation as Congress might enact for the better regulation of intercourse between them and the white race. The Courts of the United States were not vested with jurisdiction over any of these matters because these were political and administrative, over which Congress had plenary power and control.

The Indians were not citizens of the United States, were not taxed, had no right of suffrage, either by birth or naturalization, and owed no allegiance to the United States. They had no vested rights under the constitution and laws of the United States. Every right that flowed from their civil, political, or property right originated with their own constitutions and laws which the courts of the United States declined either to interpret, administer or interfere with. This is decided in Roff v. Burney, 168 U. S., 218, in 1897. In this case the Supreme Court dismissed the suit of an adopted citizen of the Chickasaw nation from whom the nation had taken the right of citizenship by a legislative act. He appealed by suit to the United States Courts. The Court held the act of the Chickasaw legislature was sovereign in the matter, and the United States courts had no jurisdiction to review or interfere with this act of domestic government; having the right to confer citizenship, it had the right to withdraw it.

"The general assembly shall have power to legislate upon all subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in the said territory, the arrest and extradition of criminals escaping from one tribe to another, the administation of justice between members of the several tribes of the said territory and persons other than Indians and members of said tribes or nations, the construction of works of internal improvement, and the common defense and safety of the nations of said territory. All laws enacted by said Council shall take effect at the time therein provided, unless suspended by the

Secretary of the Interior or the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States or the laws of Congress or existing treaty stipulations with the United States; nor shall said council legislate upon matter pertaining to the legislative, judicial, or other organization, laws, or customs of the several tribes or nations except as herein provided for. (Sec. 4 of Art. 8, of Treaty of 1866 (14 Stat., 769)."

In Elk v. Wilkins (112 U. S., 194), the Supreme Court decided that an Indian, although a native who had severed his tribal relations and adopted the civilization of the white race, could only acquire citizenship by an express statute of Congress. Hence, the complainants in this case were not citizens of the United States in 1896, if they were members of the Choctaw and Chickasaw Nations, they were subject to the constitutions and laws of the nations. The assertion of any rights in either nation as citizens of the same, could be determined in the courts of the nations which were open to them. The complaint that intermarried citizens voted and obtained property rights in the nation is disposed of by the treaty of 1866, Article 38 (14 Stat., 769).

"Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

By an act of the Choctaw council, adopted November 9th, 1875, rules governing the intermarriage of white men with native Choctaw women, the pre-requisites were a license from a circuit clerk or judge of the nation. The applicant was required to present a statement under oath that he had not a surviving wife, a certificate of good moral character signed by ten respectable Choctaw citizens by blood who certified their acquaintance for at least twelve months, and the following oath:

"I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Choctaw Nation and will neither claim nor seek from the United States Government or from judicial tribunals thereof any protection, privilege, or redress incompatible with the same as guaranteed to the Choctaw Nation by the treaty stipulations entered into between them, so help me God."

Marriages were required to be solemnized by law. By the same act it was provided that "no marriage between a citizen of the United States or any foreign nation and a female citizen of this nation entered into within the limits of this nation, except as authorized, shall be legal." By Section 5 of this act, an intermarried widow or widower continued to enjoy the rights of citizenship. Abandonment of the intermarried citizen provided by this act, of the wife or husband, forfeited the

rights of citizenship and required their summary removal from the nations. Marriage with negroes was declared a felony, punishable with fifty lashes on the bare back.

The Choctaw Nation by its laws placed a high value on citizenship in the tribe. There were ample provisions to prevent the admission of persons of immoral character. A probationary period of residence was required. The quantum of evidence in reference to residence and fitness for citizenship was greater than that imposed by the laws of the United States as a qualification for foreigners to obtain the rights of a citizen. Every claimant for citizenship in the Choctaw and Chickasaw nations had ample opportunity, through their legislative council and their courts, to have their rights determined free from control, supervision or interference by the courts of the United States. There is now no power in any Choctaw legislative or judicial body to remedy any wrongs inflicted by their governments. These tribunals are dead—abolished by the agreement of the act of 1898. The complainants had their day in court in so far as the Choctaw nation is concerned. By the Agreements of 1898 and 1902, adopted by a majority of the votes of the tribes and enacted into law by Congress in 1898 and 1902, there was abundant opportunity provided to purge the rolls of persons improperly placed thereon. By the Indian Appropriation Act of June 10, 1896 (29 Stat.,

321), there was a still further provision for enrollment:

"That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after said hearing they shall determine the right of said applicant to be so admitted and enrolled: **Provided, however,** That such application shall be made to such commissioners within three months after the passage of this act. The said Commission shall decide all such applications within 90 days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsitent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: **And provided further,** That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose rights thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof."

The complainants, therefore, had ample opportunity in which to establish their right to citizenship, either before the commission or the tribal authorities. This provision was again made plain by the act of June 7, 1897, with reference to the Choctaw Nation, in the following language:

"Provided that the words 'roll of citizenship' as

used in the act of June Tenth, Eighteen Hundred and Ninety Six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June Thirtieth, Eighteen Hundred and Ninety Seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the Council of the Nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the Council of such nation, the duly authorized courts thereof, or the Commission under the act of June Tenth, Eighteen Hundred and Ninety Six."

The complainants, therefore, had the right to make application to the tribal court or tribal committee and also to the Dawes Commission under the act of June 10, 1896.

NO INDIVIDUAL TITLE TO THE LANDS.

The use of the words "in fee simple" in the patent of the grant of lands to the Choctaw Nation, upon which complainants insist so strenuously as conferring an individual vested right in the lands, must be examined with reference to the character of the grant, its purpose and the manner in which it was used by the Choctaw Nation for about seventy years. The words "fee simple" when applied to conveyances in states which derived their

laws and customs from England, cannot be applied to a grant to Indians by the Congress of the United States in the exercise of its constitutional powers to provide for the Indians as wards of the Nation and peculiarly under its administrative power.

Parties dealing with Indians must take notice of public treaties, and the Acts of Congress. It will be noticed that the concluding statement in each of the grants to the Civilized Tribes, that the United States in every instance used such language as should retain this property as the common property of the entire Nation, and that the grant should terminate if the Nations ceased to exist or the Nations abandoned the same.

The words in the Choctaw grant, "in fee simple to them and their descendants, to inure to them while they shall exist **as a nation and live on it,"** undoubtedly mean a grant in common and a grant to the Nation, subject to its disposal by the Nation, with the consent of the United States, or its distribution among the members of the Nation only with the consent of the United States. We find these limitations in grants to Indian Nations in nearly every other treaty made by the United States with different Indian tribes.

The interpretation placed upon these conditions in the grants, claimed to be fee simple grants, by the Indian Nations, and by the Supreme Court of the United

States, interpreting not only the treaties but the Acts of Congress, make certain the proposition that the grants were grants in common to the Nations, and regarded by the Nations as property which they had a right to administer and dispose of, with the consent of the United States, for the common benefit of the constituent members of the Nations, and this is particularly true of the Choctaw Nation. The Choctaw Nation, with the consent of the United States, sold a large amount of this grant in common to the Chickasaw Nation in 1837. (11 Stat., 573). By the treaty of 1855 (11 Stat., 611), a division of the common lands was made between the Choctaws and Chickasaws, and the Choctaws relinquished to the United States all their lands west of the 100° west longitude and the Choctaws and Chickasaws leased to the United States all that portion of their common territory west of the 98° west longitude **for the permanent settlement of the Wichitas and such other tribes or bands of Indians as the Government of the United might desire to locate therein.**

In Article 11 of the treaty of 1866, between the United States and the Choctaw Nation (14 Stat., 769), we find the following language which emphasizes the understanding of the Nations themselves and the United States that these lands were held in common:

"Whereas, the land occupied by the Choctaw and

Chickasaw Nations and described in the treaty between the United States and said nations of June 22, 1855, is now held by the members of said nations in common under the provisions of said treaty."

In the treaty of 1855 (11 Stat., 611), we find the following expression:

"And pursuant to an Act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common."

It is respectfully submitted that the treaties of 1855 and 1866, the legislation of the Choctaw and Chickasaw Nations for fifty years, are far better interpretations of the character of the grant than the words "fee simple" taken from a system of law transplanted from the old world. The words in the grant will be construed as the Indians understood them, and they understood them to mean a grant in common.

In Stephens v. Cherokee Nation (174 U. S., 488), the court held with reference to these particular tribes:

"The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status, involves a contradiction in terms."

In Cherokee Nation v. Hitchcock (187 U. S., 307), in which cause there was a like contention of vested rights in individual members of the nation as is made in this case, the Court said:

"Whatever title the Indians have is in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all the members."

It is evident that the words "in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it, liable to no jurisdiction and alienation except to the United States or with their consent," are vital conditions in this grant, and the meaning of this language is not to be determined, and the rules of the common law as applied to titles in the State of New York or any of the common law States cannot be invoked to explain the meaning of this grant. Unquestionably, the living members of the Choctaw Nation who were present at the making of the treaty, and who entered into a discussion as to the nature of the title, never contemplated that any individual member of their tribe should have a vested right in any particular part of this property. The controlling reason that impelled them to give up their homes in Mississippi was their abhorrence of the white man's system of holding lands in severalty. Through centuries they were accustomed to the Indian system of holding lands in common for the benefit of every individual member of the tribe. The loss of membership in the tribe by self-expatriation or by expulsion under their laws meant a loss of an interest in the common property. For this reason the rules of interpretation adopted by the court in the case of the

Choctaw Nation (119 U. S., 27), is very properly applied to the interpretation of the grant of land made by the patent, that is, the substance of the right without regard to the technical rules framed under a system of municipal jurisprudence forming the rights and obligations of private persons equally subject to the same laws, cannot be applied to the interpretation of the words of the grant in this case.

ACT OF CONGRESS MAY SUPERSEDE TREATIES WITH INDIANS.

The lower court in taking up the complaints of the appellants, found that one of them related to matters which had been committed to the Secretary of the Interior by Congress, and that the rights of complainants were not dependent upon the construction of treaties with the United States, but the legislative power might pass laws in conflict with treaties made with the Indians. (Thomas v. Gay, 169 U. S., 264; Ward v. Race Horse, 163 U. S., 504; Spalding v. Chandler, 160 U. S., 394).

The power to abrogate treaties exists in Congress and in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. This doctrine was held in United States v. Kagama (118 U. S., 375), and the principles laid down in

that decision have been the governing principles of the United States in their dealings with the Indians.

The Constitution having given Congress the absolute control over Indian matters, it gave them power to deal with them as should in their judgment be for the best interest of the Indians; if necessary, to remove them, purchase their lands or to exchange them, and in every case to retain control over the disposition and use of the lands. For that reason Congress had the power to modify the treaties, and to even pass laws in conflict with treaties. (Cherokee Tobacco case, 11 Wallace, 616; M. K. & T. Ry. Co. v. Roberts, 152 U. S., 114; Lone Wolf v. Hitchcock, 187 U. S., 566; Thomas v. Gay, 169 U. S., 270).

The third assignment of error which complains that "the court erred in holding the grant in fee simple of the property in controversy by patent did not confer upon complainants such rights as would entitle them to have their claims thereto determined by a court of equity," insists that the individual complainants had vested rights independent of the grant in common made to the Choctaw and Chickasaw Nations. The United States made its engagements by treaty and by agreement, not with single individuals, but with the recognized authorities who, in their representative authority,

represented the two nations. This assignment practically embraces the fourth assignment of error, which again urges the vested right on behalf of claimants who had during the course of fourteen years an opportunity in which to have their rights of membership determined by the machinery provided by Congress.

The fifth assignment of error in which "the said court erred in holding that the Secretary of the Interior could construe complainants' rights secured to them under treaties with the United States, and that the construction thereof by said Secretary was final and not reviewable by a court of equity," is answered by the opinion of the Supreme Court in the case of Lone Wolf v. Hitchcock (187 U. S., 553); Cherokee Nation v. Hitchcock (187 U. S., 294), in which the court decides that the legislative power possessed by Congress over treaties with the Indians and Indian tribal property were solely within the domain of the legislative authority and that the action of Congress was conclusive upon the courts. Therefore, the court did not err in holding that it was without jurisdiction in the present case for the reason that this is Indian property and the grant was to Indians. The complainants assert that their interests and that their rights spring from their claims as Indians and as descendants of the original persons composing the tribes with which the treaty was made. The complainants ig-

nore the repeated adjudications by the Supreme Court of the Uniteed States—

"That Congress possessed a paramount power over the property of the Indians by reason of its exercise of guardianship over their interests and that such authority might be employed even though opposed to the strict letter of a treaty with the Indians."

The sixth assignment of error is: "The said court erred in holding that the questions presented for determination by complainants' bill were political in their nature and not cognizable by a court of equity." The court, having in mind the decision of the Supreme Court of the United States in the Lone Wolf case, was correct when it decided in accordance with that decision that "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning and the power has always been deemed a political one not subject to be controlled by the Judicial Department of the Government," and that the legislative power might pass laws.

The seventh assignment of error complains that "the said court erred in holding that it was without jurisdiction to entertain a suit brought by private parties, citizens of the United States, as respondents, affecting individual rights in the property in controversy." This assignment has no bearing on this case. The complainants allege that their rights spring from the grant of land to

the Choctaw and Chickasaw Nations. The members of these tribes were not citizens until the United States made them citizens by the Act of March 3rd, 1901. (31 Stat., 1447).

By the Act of June 10, 1896, the question of the tribal rolls was disposed of in the following language:

"And provided further, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof."

The Act of June 7, 1897, more clearly pointed out what is meant by the tribal rolls, and also provided a remedy for purging the rolls by an examination by the Dawes Commission, and it provided for an appeal.

If the claimants have failed to exercise the rights provided by the laws and usages of the tribe, they cannot invoke the principles of the common law of England for the correction of errors or to determine their status as members of the tribe. The true rule is summed up in Davison v. Gibson (56 F. 445), Circuit Court of Appeals of the 8th Circuit, in which the court said:

"It is common knowledge of which the court should take judicial knowledge, that the domestic relations of the Indians of this country have never been regulated by the common law of England, and that that law is not adapted to the habits, customs, and manners of the Indians."

The claimants had their day in the tribal courts which were open to them for many years. Congress by virtue of its plenary power over Indian matters, had the right to take control and terminate the domestic governments which had been in existence for many years. It did so and the tribes themselves considered it desirable in the interests of the entire membership and ratified the Agreements and gave their free consent to the legislation.

The eighth assignment of error complains that the "court erred in holding that certain provisions of certain Acts of Congress affecting the property rights claimed by certain of complainants were constitutional enactments."

The claimants deny the power of Congress to create the Dawes Commission and to vest the Commission with power to investigate the claims of any persons to enrollment. They assail the acts of the Commission in preparing the rolls and the methods of the Commission to ascertain who were really entitled to enrollment. They insist that Congress had no power to provide for appeal

from the decisions of the Dawes Commission to the United States courts for the Indian Territory and for final approval by the Secretary of the Interior. The electors of the Choctaw and Chickasaw Nations, by a majority vote, adopted the Agreement of 1898, a full corps of attorneys elaborately argued the unconstitutionality of the Act of 1898 in Stephens v. Cherokee Nation (174 U. S., 453). The Supreme Court of the United States held that this legislation was constitutional, and that the acts of the Dawes Commission were subject to review by the United States courts for the Indian Territory. The decisions of the courts of the Indian Territory in ordering the Dawes Commission to place on the tribal rolls some 1,800 persons were exceedingly unsatisfactory to the tribes. Hence Congress, in its desire and care to protect all persons claiming membership in these tribes and their right to enrollment, and to insure absolute justice, provided a new agreement which was adopted by the votes of the tribes and enacted as a law by Congress on July 1, 1902, in which a second legislative commission was created, called "The Citizenship Court." This court was vested with power to examine the decisions of the United States Courts in the Indian Territory granting the right to enrollment to a large number of persons. The court was vested with full authority to annul these judgments after due consideration in which both the nations and the party claimants were given a hearing.

The constitutionality of this second agreement, being the Act of 1902, in which the Citizenship Court was created and authorized to review the former judgments of the United States District Courts, was sustained by the Supreme Court of the United States in Wallace v. Adams (204 U. S., 419).

In the ninth assignment of error complaint is made that the agencies employed by Congress in determining the question of citizenship have erred, either through ignorance or gross mistake of law and fact, or by reason of fraud practiced upon or by them or under the influence of bribes given them by interested parties by reason whereof complainants have been wrongfully excluded from the final rolls of citizenship.

If all this were true it could do no more than vitiate or invalidate the present rolls as a finality and make necessary their reopening for the further consideration of the complainants' claim of membership in the tribes. That would still be an inquiry within the exclusive control of Congress. Sweeping charges of fraud committed by the tribal authorities and the officials of the Government upon a proper showing made to Congress could be investigated by that body under its constitutional power of administrative and political control and be remedied by appropriate legislation. If the court had jurisdiction to investigate the accuracy or good faith of their Con-

gressional agencies in the discharge of the duties imposed upon them by Congress, it is clear that the court has no power to determine the question of citizenship or membership in these tribes. Congress has not lost control of the subject matter of complainants' alleged grievances, and the court very properly declined to interfere with its administrative and political control over the affairs of these two Indian Nations. (Cherokee Nation v. Hitchcock, supra; Lone Wolf v. Hitchcock, 187 U. S., 553).

The succeeding assignments of error complain that the court erred in holding that the acts of the Secretary of the Interior were not reviewable by a court of equity, and in holding that the Secretary of the Interior had jurisdiction over the property in controversy.

The legislation by Congress providing for the partition of this property among the members of the tribe, and making the Secretary of the Interior the custodian of the rights of the Indians, has heretofore been referred to, and decisions of the Supreme Court cited sustaining the constitutionality of such legislation, and in the light of the foregoing authorities his action is final and cannot be reviewed by the courts. If the Secretary has erred, appeal is to Congress and not to the Courts.

CONCLUSION.

In conclusion, attention is called to the fact that the complainants have had their day in court in the tribunals created by Acts of Congress. For nearly fourteen years, Congress, with the free consent of the tribes, has taken the sole control of the property of the Choctaw and Chickasaw Nations; adopted methods for the ascertainment of the constituent members of the two tribes and provided for an equal distribution of the property among the members entitled to share in the same. These various methods have been subjected to the scrutiny of the courts, have been declared by the courts as constitutional and under the absolute control of Congress, and if the complainants had any grievances against the persons who had been designated to carry out the will of Congress, it is still the proper forum to address for relief. The courts have declined to interfere and there has been no jurisdiction granted by Congress to consider either the questions of enrollment or allotment in the Five Civilized Tribes.

Congress, in pursuance of a general policy for finally settling Indian affairs, to break up the tribal relations in the various tribes of Indians in the United States, to prepare them for citizenship, so that they might be incorporated among the mass of citizens and no longer be a separate people, and finally to subject them to the

general laws of the States in which they have their habitation, have passed acts for the purpose.

There was no power, prior to the legislation by Congress in the creation of the Dawes Commission, vested with authority to allot in severalty the lands of the Five Civilized Tribes. No court of the United States has any power to pass upon questions relating to the property interest in the Five Civilized Tribes unless the power be delegated by Congress. Congress has seen fit to delegate such power only in the specific instances in which it conferred jurisdiction; first, upon the United States courts of the Indian Territory, only on questions of enrollment in the tribes, and second, subjecting these judgments to review by the Citizenship Court created by the act of 1902. The statutes of the United States have not heretofore conferred any power upon any court to determine controversies concerning the allotments in the Five Civilized Tribes or to interfere with the acts of the Secretary of the Interior and other officials, who, in the exercise of the powers conferred upon them, are the mere agents of the administrative and political power of Congress in the control and final settlement of the property of these two nations. This power cannot be inferred; it must be declared by express statutes. It is well said in National Bank of Commerce v. Anderson (147 F., 87), which is cited with approval in Star v. Campbell (208

U. S., 527), with reference to Indian matters, that little is left to inference. Congress does not determine its policy by inference, but by express words from which its intention can be clearly adduced.

The Secretary of the Interior in the distribution of the property of the Choctaw and Chickasaw Nations among its members is not engaged in the mere performance of a ministerial duty. He is vested by Congress with the duty of exercising his judgment in the decision of matters which the law has given him the power and imposed upon him the duty to decide for himself. His judgment is final and conclusive and not subject to review by the courts. The judgment of the lower court is supported by all the legislation of the Congress of the United States, a legislation which has been interpreted by the Supreme Court as constitutional. It is, therefore, respectfully submitted that the judgment of the lower court is correct and should be affirmed.

Respectfully submitted,

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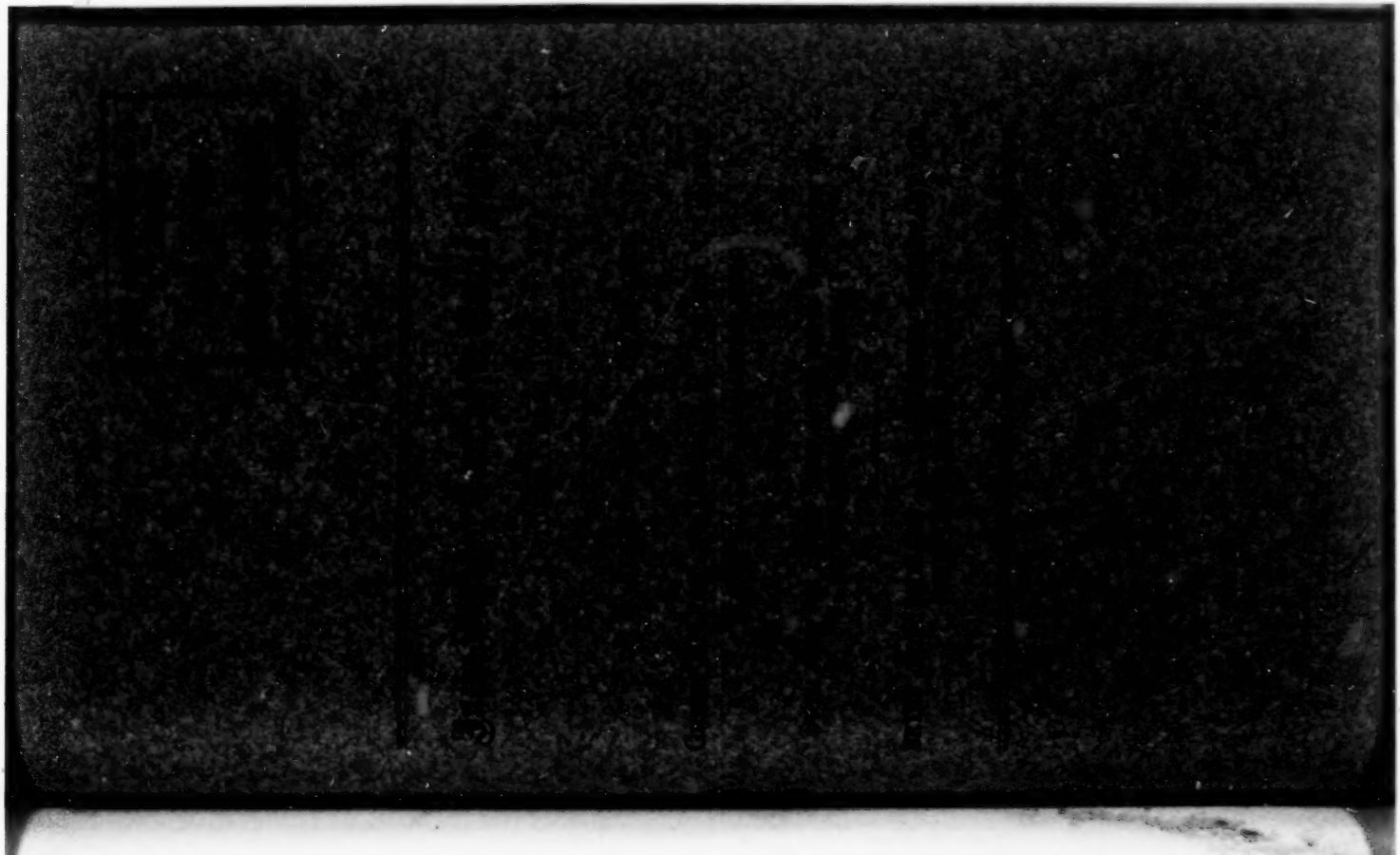
Attorneys for Appellee, Green McCurtain.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

J. E. FLEMING ET AL., APPELLANTS,
v.
GREEN MCCURTAIN, DOUGLAS H. JOHNSTON, GEORGE MANSFIELD et al., appellees.
No. 253.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF FOR RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, APPELLEE.

This case comes here on direct appeal from the United States Circuit Court, Eastern District of Oklahoma, Eighth Circuit. The right of direct appeal to this court is claimed because the jurisdiction of the circuit court is said to have been "in issue" and to have been decided against complainants, within section 5 of the Circuit Court of Appeals act of March 3, 1891.

The suit was brought in chancery by appellant Fleming "for and on behalf of Annie Huff (and about 13,000 other persons enumerated by name in the bill

of complaint filed here, but whose names are omitted from the printing of this record), all persons of Choctaw or Chickasaw Indian blood and descent" (Rec., 1), against the Secretary of the Interior, the principal chief of the Choctaw Nation (defendant McCurtain), the governor of the Chickasaw Nation (defendant Johnston) (Rec., 19), and defendants Mansfield, McMurray, and Cornish, members of a firm of lawyers at McAlester, Okla., who are alleged to have received unlawfully for services rendered to the Choctaw and Chickasaw nations considerable sums of money belonging to the common funds of those nations (Rec., 16, 17); and also against "all persons whose names appear on the rolls of 'citizens' of the Choctaw and Chickasaw nations or tribes with the names of the said Green McCurtain and Douglas H. Johnston, respectively, and all persons whose names appear upon the 'freedmen' rolls of said nations or tribes, as approved by the Secretary of the Interior on or before March 4, 1907" (Rec., 1); the general purpose of the suit being to assert the alleged rights of complainants as persons of Choctaw or Chickasaw Indian blood and descent in the lands conveyed to the Choctaw Nation by patent executed by the President of the United States on March 23, 1842 (Rec., 1, 3). In particular, complainants assert that those lands were granted not to the Choctaw Nation or tribe as a whole, or for the benefit of all who might be members of the tribe from time to time, but "for the exclusive use and benefit of a designated class of persons, consisting of all those persons who were

members of the Choctaw community of Indians on the day the treaty [i. e., the treaty stipulating for the conveyance made by patent of March 23, 1842] was ratified, to wit, February 24, 1831, and their descendants" (Rec., 2). Complainants say that they belong to such designated class of beneficiaries of the lands (Rec., 3), though it is admitted that they were not enrolled as citizens or freedmen of either the Choctaw or the Chickasaw tribe upon the list which, as will later be described, the United States and the tribes agreed and Congress enacted should be prepared in connection with and for the purpose of the recent and still pending distribution of the tribal property among individual allottees (Rec., 9).

The specific prayers of the bill of complaint are that the Secretary of the Interior be enjoined from allotting any of the tribal lands "to persons whose names appear on said rolls of 'citizens' and 'freedmen' of the Choctaw and Chickasaw nations as approved by him on or before March 4, 1907," from disposing of or encumbering any of such lands, from disbursing any proceeds of the lands, and from "interfering with the rights of any complainants in the enjoyment" of any such lands whereof complainants are in possession (Rec., 20, 21); also, that the Secretary of the Interior account for all of the tribal lands at any time disposed of by the United States and for all proceeds of such lands (Rec., 21); also, that defendants, McCurtain and Johnston, principal chief and governor, respectively, of the Choctaw and Chickasaw nations, be enjoined from conveying any

of the tribal lands allotted by the Secretary of the Interior to any citizen or freedman of the Choctaw or the Chickasaw nations, and from otherwise disposing of any such lands (Rec., 21); also, that said McCurtain and Johnston account for all proceeds of the lands received by them (Rec., 21); also, that all allottees of any of the tribal lands be enjoined from disposing of them (Rec., 21, 22); also, that the rights of complainants in such tribal lands and their proceeds be decreed by the court "and that the Secretary of the Interior be required to respect said decree in the distribution of all said property remaining under his control" (Rec., 22); also, that all allotments and conveyances of any of the tribal lands already made to others than complainants' own class, viz, descendants of the members of the Choctaw tribe on February 24, 1831 (Rec., 2), be declared void or that the grantees be declared trustees for complainants' class (Rec., 22); also, that certain conveyances to or reservations by the United States of parts of the tribal lands be set aside, and that complainants and others in like situation be given the benefit of the granted or reserved lands (Rec., 22, 23); also, that defendants, Mansfield, McMurray, and Cornish, account for all Choctaw or Chickasaw moneys received by them (Rec., 21, 23); and, generally, that all property constituting part of, and funds derived from, the lands granted by the patent of 1842 "be distributed among the lawful owners thereof, as found by the court, share and share alike" (Rec., 23).

The bill was demurred to by all defendants on the ground that the court below had no jurisdiction of the subject-matter (Rec., 26, 27), and by defendants other than the Secretary of the Interior on the further ground of lack of equity (Rec., 26). The Circuit Court sustained the demurrers, stating at the conclusion of its opinion that "the demurrer to the jurisdiction must therefore be sustained and the bill dismissed, and it is so ordered" (Rec., 40); but the actual decree recites as follows: "This cause having been set down for hearing at a former sitting of this court on the demurrers of the respondents to the bill filed herein, and the same having been argued by the counsel for the complainants as well as for the respondents respectively, also taken under advisement by the court; and the court being fully advised in the premises, ordered, decreed, and adjudged that the said demurrers to the bill be and the same are hereby sustained," and the bill was dismissed generally (p. 40).

The position taken by the Circuit Court as the basis of its decree is summarized in the following paragraph at the close of its opinion:

> In the case at bar we have held that the right of any individual to share in lands and moneys in controversy, except as to freedmen for whom special provision is made, depends upon his membership in either the Choctaw or Chickasaw tribe or nation. The determination of his question of membership rests solely with Congress and such agencies as it may employ. Congress has provided that the

> evidence of such membership shall be the tribal rolls as finally approved by the Secretary of the Interior. The bill discloses that the Secretary has acted in the matter and that complainants have been excluded from the rolls. In the light of the foregoing authorities in the opinion of this court, that action, so far as this court is concerned is final and can not be reviewed here. If the Secretary has erred to the injury of complainants, then appeal, if any, is to Congress and not to the courts. (Rec., 40.)

The prayer of complainants for an appeal reads:

> Wherefore your petitioners, J. E. Fleming, et al., considering themselves aggrieved, pray an order granting an appeal from said final decree denying the jurisdiction, as aforesaid, to the Supreme Court of the United States, as authorized by section 5 of the act of Congress of the United States, approved March 3, 1891, and pray this honorable court that said appeal be allowed upon said question of jurisdiction. (Rec., 41.)

And the appeal was allowed on the sole point of jurisdiction as follows:

> The complainants' bill having been dismissed by decree of this court on the sole ground that the court had no jurisdiction of the action; and the complainants having prayed an appeal to the Supreme Court of the United States on said question of jurisdiction, it is now ordered in open court that the appeal be allowed on that question only. (Rec., 42.)

As it is believed that, if this court has any jurisdiction of the present appeal, that jurisdiction must rest upon the ground that the case involves the construction or application of the Constitution of the United States or upon the ground that the constitutionality of a law of the United States or the construction of a treaty made under its authority is drawn in question—rather than upon the ground that the jurisdiction of the circuit court is in issue—the principal facts out of which the merits arise will now be stated; and, as most of those facts are provisions of treaties, documents, or statutes of which judicial notice must be taken, this statement will often go much beyond, and not infrequently will vary from, the allegations of the bill.

As to the title of the lands, which complainants assert belong wholly to the descendants of the members of the Choctaw tribe on February 24, 1831 (Rec., 2, 3), but which defendants assert to have been granted to the Indian nation as a whole and as it might be constituted from time to time, and for the term of the tribal life only, the first treaty between the United States and the Choctaw Nation was signed October 18, 1820, and is found in 7 Stat., 210; 2 Kappler's Indian Affairs, 2d Ed., 191.

The preample recites:

> Whereas it is an important object with the President of the United States, to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging, for a small part of their land here, a country

> beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together. And whereas it is desirable to the State of Mississippi, to obtain a small part of the land belonging to said nation; for the mutual accommodation of the parties, and for securing the happiness and protection of the whole Choctaw Nation, etc.

Article I provides that "The Mingoes, Head Men, and warriors of the Choctaw Nation, in full council assembled, in behalf of themselves and the said nation, do by these presents cede to the United States of America all the land lying and being," etc.

Article II reads: "For and in consideration of the foregoing cession, on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi River situate between the Arkansas and Red River and bounded as follows," etc.

Article VI says that "The Commissioners of the United States further covenant and agree, on the part of said States, that an agent shall be appointed, in due time, for the benefit of the Choctaw Indians who may be permanently settled in the country ceded to them beyond the Mississippi River * * * and a faithful person appointed, whose duty it shall be to use every reasonable exertion to collect all the wandering Indians belonging to the Choctaw nation upon the land hereby provided for their permanent settlement."

A second treaty was made on September 27, 1830. (7 Stat., 333; 2 Kappler's Indian Affairs, 2d Ed., 310.) The preamble recites:

> Now, therefore, that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi, etc.

Article II is important, and reads:

> The United States under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to enure to them while they shall exist as a nation and live on it, beginning, etc.

Article III provides that—

> In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree to move beyond the Mississippi River early as practicable.

Article IV says:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw

> Nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State.

Article XI declares that "navigable streams shall be free to the Choctaws, who shall pay no higher toll or duty than citizens of the United States."

Article XVIII reads in its entirety:

> The U. S. shall cause the lands hereby ceded to be surveyed; and surveyors may enter the Choctaw country for that purpose, conducting themselves properly and disturbing or interrupting none of the Choctaw people. But no person is to be permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove. And for the payment of the several amounts secured in this treaty, the lands hereby ceded are to remain a fund pledged to that purpose, until the debt shall be provided for and arranged. And further it is agreed, that in the construction of this treaty wherever well founded doubts shall arise, it shall be construed most favorably toward the Choctaws.

Article XX contains miscellaneous provisions which serve to show that all the while the treaty looks to the Choctaw Nation and the national benefit.

The interest of the Chickasaw tribe in the Choctaw lands arose from the treaty of January 17, 1837, between the two tribes. (11 Stat., 573; 2 Kappler's Indian Affairs, 2d Ed., 486.)

In Article I—

> It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a dis-

> trict within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the *right* of disposing of it (which is held in common with the Choctaws and Chickasaws), to be called the Chickasaw district of the Choctaw Nation.

In Article III the Chickasaws agree to pay the Choctaws as a consideration for these rights and privileges the sum of $530,000—

> thirty thousand of which shall be paid at the time and in the manner that the Choctaw annuity of 1837 is paid, and the remaining five hundred thousand dollars to be invested in some safe and secure stocks, under the direction of the Government of the United States, redeemable within a period of not less than twenty years—and the Government of the United States shall cause the interest arising therefrom to be paid annually to the Choctaws in the following manner: Twenty thousand dollars of which to be paid as the present Choctaw annuity is paid, for four years, and the residue to be subject to the control of the general council of the Choctaws; and after the expiration of the four years the whole of said interest to be subject to the entire control of the said council.

In 1842 came the patent executed by the President as contemplated in the treaty of 1830; and it reads:

> The United States of America to all to whom these presents shall come, greeting:
>
> Whereas by the second article of the treaty began and held at Dancing Rabbit Creek on

the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States on the 24th February, 1831), by the commissioners on the part of the United States and the mingoes, chiefs, captains, and warriors of the Choctaw Nation on the part of said nation, it is provided that "the United States, under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River; running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning; the boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825:"

Now, know ye that the United States of America, in consideration of the premises and in execution of the agreement and stipulations in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation the aforesaid "tract of country west of the Mississippi," to have and to hold the same, with all the rights, privileges, immunities, and appurtenances of

whatsoever nature thereunto belonging, as intended to be conveyed by the aforesaid article, "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," liable to no transfer or alienation except to the U. States or with their consent.

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-sixth.

(SEAL.) JOHN TYLER.

By the President:

DAN'L WEBSTER,
Secretary of State.

JOHN C. SPENCER,
Secretary of War.

T. HARTLEY CRAWFORD,
Commissioner of Indian Affairs.

Recorded vol. 1, page 43.

J. WILLIAMSON,
Recorder of the General Land Office.

Executed in the Bureau of Topographical Engineers.

JOHN J. ABERT,
Col., Corps T. Engineers.

(Sen. Doc., No. 124, 46th Cong., 2d sess., p. 5.)

It is through the force of this patent that complainants assert individual rights in the Choctaw lands to have been vested in themselves and the other descendants of those who were Choctaw citizens at the time of ratification of the treaty of 1830, exclusively of all other members of the Choctaw or Chickasaw tribes at any time.

On June 22, 1855, a further treaty was made between the United States, the Choctaws, and the Chickasaws, because (as the preamble of the treaty recites) "it is necessary for the simplification and better understanding of the relations between the United States and the Choctaw Indians that all their subsisting treaty stipulations be embodied in one comprehensive instrument." (11 Stat., 611; 2 Kappler's Indian Affairs, 2d Ed., 706, 707.)

Article I of this treaty says:

> The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz, * * * and pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however*, No part thereof shall ever be sold without the consent of both tribes; and that said lands shall revert to the United States if

said Indians and their heirs become extinct, or abandon the same.

Article IX reads:

> The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in, and to any and all lands, west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however,* The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

After the civil war, both because the Indians had given aid and comfort to the Confederate States, and because it was desired to give necessary help to the

negroes who had been held in slavery among the Indians, the United States negotiated another treaty with the Choctaws and Chickasaws, which was signed April 28, 1866. (14 Stat., 769; 2 Kappler's Indian Affairs, 2d Ed., 918.)

After an agreement in Article II that slavery and involuntary servitude, otherwise than in punishment of crime, should cease, it was provided in Article III as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nation at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations, respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and

Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter,—less such sum—at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

This treaty of 1866 also contained the initial proceedings for a change from the common proprietorship of the Choctaw and Chickasaw peoples to individual allotments; as to which provisions Articles XI, XV, XXV, and XXXIII should be noticed.

Article XI declares:

> Whereas the land occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and said nations, of June 22, 1855, is now held by the members of said nations in common, under the provisions of the said treaty; and whereas it is believed that the holding of said land in severalty will promote the general civilization of said nations, and tend to advance their permanent welfare and the best interests of their individual members, it is hereby agreed that, should the Choctaw and the Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land on the system of the United States, the land aforesaid east of the ninety-eighth degree of west longitude shall be, in view of the arrangements hereinafter mentioned, surveyed and laid off in ranges, townships, sections, and parts of sections, etc.

Article XV reads:

> At the expiration of the ninety days' notice aforesaid, the selection which is to change the tenure of the land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty shall take place, when every Choctaw and Chickasaw shall have the

> right to one quarter section of land, whether male or female, adult or minor, and if in actual possession or occupancy of land improved or cultivated by him or her, shall have a prior right to the quarter section in which his or her improvement lies; and every infant shall have selected for him or her a quarter section of land in such location as the father of such infant, if there be a father living, and if no father living, then the mother or guardian, and should there be neither father, mother, nor guardian, then as the probate judge of the county, acting for the best interest of such infant, shall select.

Article XXV provides for patents of selected lands. Article XXXIII reads:

> All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected land shall be the common property of the Choctaw and Chickasaw nations in their corporate capacities, subject to the joint control of their legislative authorities.

We now come to the acts of Congress and the agreements with the Indians which developed the system of individual allotments of the tribal lands, and under which the distribution of those lands and their proceeds were restricted to such Indians as might be recognized and listed as citizens or freedmen of the tribes by certain agencies which Congress created for the purpose, viz, the Dawes Commission and the Citizenship Court, whose lists were subject to final scrutiny and action by the Secretary of the

Interior. It is because complainants did not succeed in getting enrolled by these agencies as Choctaw or Chickasaw citizens (Rec., 9), and because of the finality of their rolls upon the privilege of allotment, that complainants (if their theory of individual vested rights under the patent of 1842 fails) can not ask the courts, on the basis of their allegation of their "Choctaw or Chickasaw Indian blood and descent" (Rec., 1), to admit them among the class expressly designated by the congressional legislation and the Indian agreements as distributees or beneficiaries of the tribal lands.

The history of these enactments and agreements is—

The Dawes Commission was created by the act of Congress approved March 3, 1893; ch. 209; 27 Stat., 612.

Section 15 of this act provides:

> The consent of the United States is hereby given to the allotment of lands in severalty not exceeding 160 acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; * * * and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

Section 16 provides:

> The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into

negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory. * * *

Such commissioners shall, under such regulations and directions as shall be prescribed by the President, through the Secretary of the Interior, enter upon negotiation with the several nations of Indians as aforesaid in the Indian Territory, and shall endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each such nation, tribe, or band, respectively, as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be found just and

> suited to the circumstances; for which purpose, after the terms of such an agreement shall have been arrived at, the said commissioners shall cause the lands of any such nation or tribe or band to be surveyed and the proper allotment to be designated; and, secondly, to procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States; and to make proper agreements for the investment or holding by the United States of such moneys as may be paid or agreed to be paid to such nation or tribes or bands, or to any of the Indians thereof, for the extinguishment of their title therein. (27 Stat., 645; 1 Kappler's Indian Affairs, 2d Ed., note on pp. 79, 80.)

The act of June 10, 1896, continuing the Dawes Commission, says:

> And said commission is directed to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them and report from time to time to Congress.
>
> That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled:
>
> *Provided, however,* That such application shall be made to such commissioners within three months after the passage of this act.

The said commission shall decide all such applications within ninety days after the same shall be made.

That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes:

And provided further, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights

of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes:

Provided, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court:

Provided, however, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

The commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities.

And said commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs. (29 Stat., 321, 339–340; 1 Kappler's Indian Affairs, 2d Ed., 80, 81.)

The act of June 7, 1897, provides:

> That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if it conflict therewith as to said nation:
>
> *Provided*, That the words "roll of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days previous notice that said commission will investigate and determine the right of

such party to remain upon such roll as a citizen of such nation:

Provided, also, That anyone whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six. (30 Stat., 62, 84; 1 Kappler's Indian Affairs, 2d Ed., 88.)

The act of June 28, 1898, has many important provisions. (30 Stat., 495; 1 Kappler's Indian Affairs, 2d Ed., 90–100, 646–656.)

Section 11 says:

SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits; and all town sites shall also be reserved to the several tribes, and shall be set apart by the commission heretofore mentioned as inca-

pable of allotment. There shall also be reserved from allotment a sufficient amount of lands now occupied by churches, schools, parsonages, charitable institutions, and other public buildings for their present actual and necessary use, and no more, not to exceed five acres for each school and one acre for each church and each parsonage, and for such new schools as may be needed; also sufficient land for burial grounds where necessary. When such allotment of the lands of any tribe has been by them completed, said commission shall make full report thereof to the Secretary of the Interior for his approval:

Provided, That nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any such act of Congress:

Provided further, That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires:

Provided further, That if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands.

Section 12 reads:

> That when report of allotments of lands of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act.

Section 21 provides:

> Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes.
>
> Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior. * * * It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and

all their descendants born to them since the date of the treaty.

It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however*, That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or treaties with the United States.

Said commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said commission for enrollment, at such times and places as may be fixed by said commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

Section 29 provides:

That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April,

eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first day of December, eighteen hundred and ninety-eight, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; * * * which said amended agreement is as follows:

Among other things the agreement provides:

That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands. (30 Stat., 505; 1 Kappler's Indian Affairs, 2d Ed., 647.)

Provided further, That the Commission to the Five Civilized Tribes shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress. (30 Stat., 506; 1 Kappler's Indian Affairs, 2d Ed., 648.)

That as soon as practicable, after the completion of said allotments, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. (30 Stat., 507; 1 Kappler's Indian Affairs, 2d Ed., 649.)

It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal government so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes. (30 Stat., 512; 1 Kappler's Indian Affairs, 2d Ed., 654.)

An act of March 3, 1901, provided that:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or either of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto. (31 Stat., ch. 832, pp. 1058, 1077.)

The act of July 1, 1902, ratifies the agreement made by the Dawes Commission with the Choctaw and Chickasaw tribes on March 21, 1902, and it is found in 32 Stat., 641; 1 Kappler's Indian Affairs, 2d Ed., 771.

Among other things it provides:

> 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty

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acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements. (32 Stat., 642; 1 Kappler's Indian Affairs, 2d Ed., 772.)

23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land. (32 Stat., 644; 1 Kappler's Indian Affairs, 2d Ed., 774.)

27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats., 495), and the act of Congress approved May 31, 1900 (31 Stats., 221), except as herein otherwise provided: *Provided*, That no person claiming right to enrollment and allotment and distribution of tribal prop-

erty, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

28. The names of all persons living on the date of the final ratification of this agreement entitled to be enrolled as provided in section 27 hereof shall be placed upon the rolls made by said commission; and no child born thereafter to a citizen or freedman and no person intermarried thereafter to a citizen shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws.

29. No person whose name appears upon the rolls made by the Commission to the Five Civilized Tribes as a citizen or freedman of any other tribe shall be enrolled as a citizen or freedman of the Choctaw or Chickasaw nations.

30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens

of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes. (32 Stat., 646; 1 Kappler's Indian Affairs, 2d Ed., 776.)

34. During the ninety days first following the date of the final ratification of this agreement, the Commission to the Five Civilized Tribes may receive applications for enrollment only of persons whose names are on the tribal rolls, but who have not heretofore been enrolled by said commission, commonly known as "delinquents," and such intermarried white persons as may have married recognized citizens of the Choctaw and Chickasaw nations in accordance with the tribal laws, customs and usages on or before the date of the passage of this act by Congress, and such infant children as may have been born to recognized and enrolled citizens on or before the date of the final

ratification of this agreement; but the application of no person whomsoever for enrollment shall be received after the expiration of the said ninety days: *Provided*, That nothing in this section shall apply to any person or persons making application for enrollment as Mississippi Choctaws, for whom provision has herein otherwise been made.

35. No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement. (32 Stat., 649; 1 Kappler's Indian Affairs, 2d Ed., 779.)

Finally, the act of April 26, 1906, provides:

That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except

as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. * * * *Provided*, That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

* * * * *

SEC. 4. That no name shall be transferred from the approved freedmen, or any other approved rolls of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, to the roll of citizens by blood, unless the records in charge of the Commissioner to the Five Civilized Tribes show that application for enrollment as a citizen by blood was made within the time prescribed by law by or for the party seeking the transfer, and said records shall be conclusive evidence as to the fact of such application, unless it be shown by documentary evidence that the Commission to the Five Civilized Tribes actually

received such application within the time prescribed by law.

* * * * *

SEC. 16. That when allotments as provided by this and other acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him, and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes.

* * * * *

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other act of Congress. (34 Stat., 137, 138, 143, 148.)

Confronted by the finality of the rolls of citizens and freedmen as made by the tribunals constituted by Congress and as approved by the Secretary of the Interior, complainants claim that the agreements of

April 23, 1897, and July 1, 1902, with the tribes were not consented to by the descendants of the Choctaws of February 24, 1831, and also that they were not properly ratified by the tribe as a whole; alleging that such agreements "were not approved by the said designated class of persons or by a majority of said designated class of persons," and

> that no one but adult males were permitted to participate in the elections at which said pretended agreements were claimed to have been ratified, whereas the property belonged as much to the women and minor children as it did to the adult males, and no valid agreement could have been entered into without their approval and consent; that at said elections several thousand persons who had been adopted, or who had intermarried, into said tribes and who had thereby acquired civil and political rights, but who were not of the said designated class of persons for whose exclusive use said grant was made, and therefore had no lawful interest in said property, were permitted to vote in said elections, which resulted in the alleged ratification of said agreements, and that it was by reason of the votes of said intermarried and adopted persons that said agreements were apparently ratified; that no person, not even a male adult, who was a member of said designated class of persons was permitted to vote in said elections unless he had theretofore been recognized by the tribal authorities and enrolled on one of the tribal rolls prepared by persons pecuniarily interested in the division of the tribal property and

> was at the time of said elections a *bona fide* resident of said nations; that said pretended agreements were never approved by complainants, were never in truth and fact, or in law ratified by a majority of the lawful owners of said property, and are therefore unconstitutional, null, and void. (Rec., 6.)

Complainants also charge that various frauds or irregularities occurred in the making of the rolls of citizenship and freedmen by the Dawes Commission and by the Citizenship Court (which latter tribunal was established by Congress for the exercise of certain appellate jurisdiction over the decisions of the United States courts in the Indian Territory on questions of citizenship and enrollment appealed to the latter courts from the Dawes Commission; Arts. 31–33 of the agreement of March 21, 1902, ratified by the act of July 1, 1902). These allegations will be found in Division XIII of the bill (Rec., 9–12), except that at the end of Division XII and also at the end of Division XXII of the bill it is further alleged that some of the members of the Citizenship Court were bribed to decide against the enrollment of a large number of applicants, including many who "were among the designated class of persons for whose exclusive use and benefit the grant [i. e., the patent of 1842] was made and are complainants herein" (Rec., 8, 9, 16). It is not specified which or how many complainants were refused enrollment by the Citizenship Court.

The claims of fraud will be considered, as to their sufficiency and effect, in Points VIII and IX of this brief; and, as the allegations of the bill could not well be shortened, attention is now called only to these facts:

The bill nowhere alleges that complainants were or are in fact Choctaw or Chickasaw citizens or freedmen. It only alleges that they are "of Choctaw or Chickasaw Indian blood and descent and members of a designated class of persons for whose exclusive use and benefit a special grant was made by letters patent from the President of the United States on February 23, 1842" (Rec., 1, 3, 9, 13).

The bill nowhere charges fraud on the part of the Secretary of the Interior, whose final consideration of the matter and approval of the rolls made those rolls of citizens and freedmen effective.

Apart from the asserted bribery of members of the Citizenship Court, the bill makes merely general and indefinite allegations of the use of evidence which complainants aver to have been worthy of little weight (Rec., 9, 10), or disregard of evidence which complainants think should have been considered important (Rec., 10), or supposedly irregular inclusion on the rolls of persons who should not have been enrolled (Rec., 11), or mere haste or unseemliness of action (Rec., 11, 12), or secretion of records whose nature and materiality are not disclosed (Rec., 12), or illegal rulings whose character and effect are not indicated and whose injurious operation upon complainants is not

made to appear (Rec., 12), or supposed summariness of decision (Rec., 12).

Most of the charges of fraud or irregularity are only concerning "many" of complainants, or a "great majority of them," etc.; and this is true in reference to the charge of bribery of the Citizenship Court (Rec., 8); and it is nowhere stated that any alleged fraud or irregularity affected complainant Fleming, who sues on behalf of 13,000 others besides himself, and who is the real appellant and alone gave appeal bond (Rec., 44).

ARGUMENT.

Consideration will be given to the following points: The jurisdiction of this court on the present appeal and its scope, if jurisdiction exists (Points I and II); the claim of complainants that the patent of 1842 gave them vested individual rights, instead of being a grant to the Indian nation only (Point III); the effect and validity of the legislation of Congress, supported also by the agreements with the Indians, in confining the right to participate in the distribution of the tribal lands to such persons as might actually be enrolled as Choctaw or Chickasaw citizens or freedmen by the Dawes Commission or the Citizenship Court, with the final approval of the Secretary of the Interior, to whom Congress gave exclusive jurisdiction over the matter of enrollment (Point IV); the inability of the courts themselves to enroll complainants or others as Choctaw or Chickasaw citizens or to extend to them the privilege of participating

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in the distribution of the tribal property without such enrollment (Point V); the failure of the bill of complaint to aver that complainants were or are in fact Choctaw or Chickasaw citizens (Point VI); the absence from the suit of the Choctaw and Chickasaw nations and of the United States, one or the other of whom is a necessary party (Point VII); and the insufficiency and immateriality of the charges of fraud or irregularity in the making of the rolls of Choctaw and Chickasaw citizens (Points VIII and IX).

I.

This court has no jurisdiction on the present direct appeal from the Circuit Court, because the jurisdiction of the Circuit Court is not in issue and was not denied by the decision below, within section 5 of the act of March 3, 1891.

The decision below was not that the Circuit Court was without jurisdiction, if any court could entertain the suit, but was that the determination of the question of complainants' membership of the Choctaw or Chickasaw tribe rested solely with Congress or with such agencies as it might employ, that Congress had enacted that the tribal rolls as finally approved by the Secretary of the Interior should be decisive on such question, and that accordingly no court has power to review or alter the rolls of citizenship, and "the appeal is to Congress and not to the courts." (Rec., 40.)

This means that the question of citizenship in the Indian tribes is a political rather than a judicial

question, and is not open for consideration in any court, State or Federal, but has been settled for all courts by Congress. The question of citizenship was held, in view of the congressional legislation, not to be justiciable.

Such a decision affords no basis for a direct appeal to this court on the question of jurisdiction, and many cases decided by this court so rule.

Mr. Chief Justice Fuller said in *Bache* v. *Hunt* (193 U. S., 523):

> It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal court (p. 525).

In *Kansas City N. W. R. R. Co.* v. *Zimmerman* (210 U. S., 336) a direct appeal to this court was held improper when the jurisdiction of the Circuit Court was denied on the ground that the state court where the proceeding started had no jurisdiction, rather than upon a ground going to the jurisdiction of the Federal court as such.

In *Bien* v. *Robinson* (208 U. S., 423) it was held that no direct appeal would lie when, instead of the power of a United States court as such being questioned, the controversy really was whether a circuit court may entertain under its general authority a summary proceeding to compel repayment of assets wrongfully withheld from a receiver appointed by it.

In *Louisville Trust Co.* v. *Knott* (191 U. S., 225) it was said:

> In all this there was nothing involving the jurisdiction of the Circuit Court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other. (p. 233.)

Where the question was whether a district court sitting in bankruptcy could proceed in a summary way, the jurisdiction of that court was held not involved so as to warrant direct appeal. (*Schweer* v. *Brown*, 195 U. S., 171.)

A decision by the Circuit Court that it can not interfere with the judgment of a state court concerning distribution of an estate which that court has authority to administer does not warrant direct appeal. (*Blythe* v. *Hinckley*, 173 U. S., 501.)

Nor does a decision that the case is not of equitable cognizance affect the jurisdiction of the court as a Federal court. (*Smith* v. *McKay*, 161 U. S., 355.)

The jurisdiction of the court is not involved under a plea which, instead of questioning the right of the court to act, really operates as a plea in bar. (*Texas & Pacific Ry. Co.* v. *Saunders*, 151 U. S., 105.)

Further, the Circuit Court really decided the merits of this case, as it had jurisdiction to do. The conclusiveness of the citizenship rolls approved by the Secretary of the Interior upon all courts was not a reason for holding that the bill should be dismissed for lack of jurisdiction, but was a reason rather for holding on the merits that complainants were not citizens of the Choctaw or Chickasaw tribe and were not entitled to allotments, and consequently that the bill should be dismissed on the merits. The Circuit Court for Oklahoma could render that judgment as well as any court could; and while the conclusion of the opinion is that the demurrer to the jurisdiction should be sustained (Rec., 40), the actual decree sustained the demurrers and dismissed the bill generally without mention of the jurisdictional ground (Rec., 40).

Nor can this court have jurisdiction of the present appeal on the ground that the case involves the construction or application of the Federal Constitution or upon the ground that the constitutionality of the congressional legislation or the construction of the Indian treaties is drawn in question, because complainants did not pray, nor were they allowed, a

general appeal. The prayer for appeal was: "Wherefore your petitioners, J. E. Fleming, et al., considering themselves aggrieved, pray an order granting an appeal from said final decree denying the jurisdiction, as aforesaid, to the Supreme Court of the United States, as authorized by section 5 of the act of Congress of the United States, approved March 3, 1891, and pray this honorable court that said appeal be allowed upon said question of jurisdiction." (Rec., 41.)

The Circuit Court's order was:

> The complainants' bill having been dismissed by decree of this court on the sole ground that the court had no jurisdiction of the action; and the complainants having prayed an appeal to the Supreme Court of the United States on said question of jurisdiction, it is now ordered in open court that the appeal be allowed on that question only. (Rec., 42.)

The case is not here, therefore, for general consideration. Neither complainants nor the Circuit Court have presented any other than the jurisdictional question.

Actual allowance of an appeal is indispensable to its operation. (*Barrel* v. *Transportation Company*, 3 Wall., 424; *Pierce* v. *Cox*, 9 Wall., 786.)

In *Bien* v. *Robinson* (*supra*), after allowing the writ of error, the circuit judge certified that the question of jurisdiction was involved, and this court, by Mr. Justice White, said:

> As the writ of error was allowed upon assignments claimed to present questions as to

> the jurisdiction of the Circuit Court, and the circuit judge certified the question of jurisdiction, the writ might well be treated as bringing up only jurisdictional questions. Inasmuch, however, as the right to bring a case directly to this court exists when constitutional questions are raised and decided in the Circuit Court, we will briefly notice the assignments not stated as jurisdictional (p. 427).

Those assignments were then held trivial and the writ of error was dismissed. This case seems to enforce the proposition that the present appeal can not be treated as other than jurisdictional, in view of its having been prayed and allowed merely as such.

In *Giles* v. *Harris* (189 U. S., 475) it was said:

> Although the certificate relates only to the jurisdiction of that court as a court of the United States, yet, as the ground of the bill is that the constitution of Alabama is in contravention of the Constitution of the United States, the appeal opens the whole case under the act of 1891, c. 517, sec. 5, 26 Stat., 827. The plaintiff had the right to appeal directly to this court. The certificate was unnecessary to found the jurisdiction of this court, and could not narrow it. As the case properly is here we proceed to consider the substance of the complaint. (p. 486.)

It would seem, however, that in this case the appeal was prayed and allowed generally, without such limitation as was expressly imposed in the present case; and then the general appeal would properly bring up the whole case, notwithstanding the certificate.

II.

If this court has jurisdiction at all, the merits of the whole case are here; not merely the question of the jurisdiction of the court below.

This is because this court's jurisdiction must be founded upon the presence in the case of a constitutional or treaty question, if the express limitation of the prayer for appeal and of the allowance of the appeal to the question of the Circuit Court's jurisdiction be disregarded. When the right of direct appeal under section 5 of the Evarts Act rests upon some other of the grounds enumerated in section 5 than mere jurisdiction, the entire case is before this court. (*Horner* v. *United States*, 143 U. S., 570; *Williamson* v. *United States*, 207 U. S., 425.)

III.

The title granted by the patent of 1842 pursuant to the treaty of 1830 vested in the Indian nation or tribe as a whole; and no private estate or right was conveyed to any individual member of the tribe or to any particular class or group of members of the tribe.

The claim of complainants is that the lands were granted, not to the nation as a whole, i. e., to all its members as they might be from time to time in the future existence of the nation, but to those individuals who were the members of the tribe at the date of ratification of the treaty of 1830, or of the patent, and that the descendants of such individuals succeeded to the lands by descent. The falsity of this claim is shown by—

1. The entire history of the treaty relations of the United States with the Choctaw tribe.

2. The history of congressional legislation as to these lands.

3. The treatment of the grant at all times by the Choctaw tribe, which repeatedly assumed and exercised the power to dispose of the grant as its national council saw fit, by proper vote of that legislature or by decision of a fraction of the members of the tribe at the time of the vote.

4. The language of the patent of 1842 itself.

5. The decisions of this court concerning legislation as to the Choctaw tribe and lands, and also concerning other Indian grants and enactments of Congress.

6. The decisions of the Circuit Court of Appeals for the Eighth Circuit.

Of these in detail—

1. A clear statement of the successive treaties is made in *United States* v. *Choctaw, etc., Nations* (179 U. S., 494).

As, however, the parts of treaties pertinent in that case are naturally different from what is significant in the present case, I have given full quotations in the opening statement of this brief of the provisions now most important. Brief attention is here called to what is of special moment.

(*a*) The consideration for the grant to the Choctaws of the lands in Indian Territory was the removal of the nation from their lands east of the Mississippi River and, chiefly, their cession of these latter, national lands.

Thus, the preamble of the treaty of 1820 recites:

> Whereas it is an important object with the President of the United States, to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together.

Article I provides that "The Mingoes, Head Men, and warriors of the Choctaw Nation, in full council assembled, in behalf of themselves and the said nation, do by these presents cede to the United States of America all the land lying and being," etc.

Article II of the treaty states expressly that the western lands are ceded "for and in consideration of the foregoing cession, on the part of the Choctaw Nation."

The treaty of 1830 shows the same thing. Its preamble recites that the Choctaws "have determined to sell their lands east of the Mississippi River," etc.; the United States by Article II agrees to grant them the western territory; and in Article III the Choctaws expressly cede their national property in the east "in consideration of the provisions contained in the several articles of this treaty," including of course the cession of the western lands.

The patent of 1842 was executed, as indeed it declares in terms, in performance of the prior treaty obligation of the United States to grant the lands.

(*b*) The explicit language of the treaties of 1820 and 1830 makes the Choctaw Nation the grantee of the western lands.

The preamble of the treaty of 1820 has already just been quoted. It states the object to perpetuate the Choctaws as a nation by the contemplated exchange of lands, and it further says that the western lands will be a place "where all who live by hunting and will not work may be collected and settled together."

Article II of the 1820 treaty, which provides for the cession, declares in terms that the United States commissioners "do hereby cede to said nation" the western region.

Article II of the treaty of 1830, which contains the covenant for the patent of 1842, provides that: "The United States shall cause to be conveyed to the Choctaw Nation a tract of country," etc., to inure to them "while they shall exist as a nation and live on it."

(*c*) The treaties executed after the patent show that the Choctaws constantly spoke of the western territory as national lands.

In Article I of the treaty of 1855 it is said: "The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country."

By Article IX "the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude."

The language of Article XI of the treaty of 1866 is altogether conclusive. It reads:

> Whereas the land occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and said nations, of June twenty-second, eighteen hundred and fifty-five, is now held by the members of said nations in common, under the provisions of the said treaties; and whereas it is believed that the holding of said land in severalty will promote the general civilization of said nations, etc.

Article XXXIII of the same treaty is no less decisive. It reads:

> All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected land shall be the common property of the Choctaw and Chickasaw nations in their corporate capacities, subject to the joint control of their legislative authorities.

Miscellaneous provisions of the treaties of 1820 and 1830 show that the United States in establishing the Indians in the West at all times had in mind and sought the benefit of the Indian nation as a whole.

See Article IV of the treaty of 1820; Articles VI, XI, XVIII, and XX of the treaty of 1830.

2. The entire congressional legislation shows that the Choctaw grant has been always viewed and treated as national, rather than to individuals.

(*a*) The whole scheme of individual allotments of the lands, begun in 1893 and still in progress, was

unnecessary and is invalid if the lands already, as a result of the patent of 1842, belonged to particular individuals.

Section 15 of the act of March 3, 1893, says that "the consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles."

Section 16 of the same act called for the consent of the "nations or tribes of Indians" to the allotment plan.

(*b*) Congress considered, indeed, that the lands would revert to the United States upon the termination of the Indian national existence.

Section 15 of the act of March 3, 1893, says that "upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 27 of the act of April 26, 1906, reads:

> That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with

any allotments heretofore or hereafter made or to be made under the provisions of this or any other act of Congress.

(*c*) Among the express purposes of the Dawes Commission was "the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by the cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes." (Act of March 3, 1893, sec. 16.)

(*d*) The legislation also contemplates and requires the holding of all moneys derived from any of the lands for the tribe as a whole.

Thus the Dawes Commission was instructed "to make proper agreements for the investment or holding by the United States of such moneys as may be paid or agreed to be paid to such nation or tribes or bands, or to any of the Indians thereof, for the extinguishment of their title therein." (Sec. 16 of the act of March 3, 1893.)

Likewise, the $300,000 paid to the Choctaws and Chickasaws for the cession of their lands west of the ninety-eighth meridian was to be held "in trust for the said nations." (Art. III of the treaty of 1866.)

(*e*) The entire legislation is full of expressions, too numerous for repetition, recognizing the tribal proprietorship of the territory.

3. The Choctaws and Chickasaws have always exercised powers over the land which were altogether

inconsistent with the existence of individual rights or estates.

(*a*) The treaty of 1837 giving the Chickasaws an interest in the Choctaw territory said:

> It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it (which is held in common with the Choctaws and Chickasaws), to be called the Chickasaw district of the Choctaw Nation.

If the land were not national, the tribe could not thus dispose of it in violation of individual right.

Similar power of sale was often exercised by the tribe, e. g.:

By the treaty of 1855, Article IX, the tribe relinquished all claim west of the one hundredth meridian.

By the same article the tribe also leased other lands to the United States for the permanent settlement of the Wichita and other tribes.

By Article III of the treaty of 1866 the tribe relinquished to the United States the land west of the ninety-eighth degree of longitude.

(*b*) The assumption by the tribes of power to consent to the recent general allotment plan is likewise incompatible with complainants' claim of private ownership; and the tribe, no less than Congress, has asserted this power ever since the treaty of 1866. (See Articles XI, XV, XXV, and XXXIII of that treaty.)

4. The language of the patent of 1842 is quoted in full on pages 11–13, *ante*.

The granting clause follows accurately the wording of the covenant in Article II of the treaty of 1830, and it really makes much argument superfluous. It is—

> The United States of America, in consideration of the premises and in execution of the agreement and stipulations in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation the aforesaid tract of country west of the Mississippi River, to have and to hold the same, with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, as intended to be conveyed by the aforesaid article, in fee simple to them and their descendants, to enure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent.

It should be noticed of this language that—

(1) The "Choctaw Nation" is the express and only grantee.

(2) The clause "to enure to them while they shall exist as a nation and live on it" expressly indicates the nation as the beneficiary, just as the national life limits the term of the grant.

(3) The clause "liable to no transfer or alienation except to the United States or with their consent" is natural in a grant to the tribe, but would be strange otherwise.

Complainants seek to focus attention on certain mere incidental or detail features of the transaction, neglecting the whole history of the grant both before and after the patent, as well as the primary granting words. Thus complainants lay stress upon the fact that the treaty of 1830 provided, as the patent recites, that the United States should convey "under a grant specially to be made by the President of the United States" (Art. II); and upon the fact that the treaty and the patent both say "in fee simple to them and their descendants."

These clauses can give no trouble. The provision for a "grant specially to be made" means only that a patent or other formal conveyance should be made as an additional muniment or evidence of title reenforcing the treaty. This language may possibly also have contemplated a sealed conveyance. Even the treaty clause calling for the special conveyance, however, said that it should be "to the Choctaw Nation;" and the addition of a patent to the treaty agreement can have no significance upon the character of the title conveyed. Similar patents to Indian tribes have been common. For example see *Cherokee Nation* v. *Journeycake* (155 U. S., 196, 207).

Nor is any peculiar effect to be given to the words "in fee simple to them and their descendants." They were obviously used to limit or mark out an estate going beyond the life of the then living Indians. They carry on the idea of "fee simple;" though in truth all these words are inapt for the case, because they are incongruous with the plain and

emphatic words immediately following, viz, "to enure to them while they shall exist as a nation and live on it."

The patent's language followed strictly the treaty provision, and Indian treaties are to be construed as the Indians in their unlettered way would naturally understand the matter. The nice rules of an artificial and elaborate system of law are not to be applied to them. (*United States* v. *Choctaw, etc., Nations*, 179 U. S., 494, 531, 532; *Jones* v. *Meehan*, 175 U. S., 1, 11; *Choctaw Nation* v. *United States*, 119 U. S., 1, 27, 38; *Worcester* v. *Georgia*, 6 Pet., 515, 582.)

Can anybody believe that the Choctaws thought that these lands were not being given to the nation (in place of their former home east of the Mississippi River, for which they were received in exchange), but were being granted to individuals and to descendants of those individuals who in the future would naturally constitute a mere part of the tribe?

It must be noticed, too, that no such language as is found in the special clauses of the treaty of 1830 and the patent on which complainants rely was in the treaty of 1820, where the simple provision was that "the commissioners of the United States in behalf of said States do hereby cede to said nation a tract of country west of the Mississippi River situate between the Arkansas and Red River and bounded as follows." (Treaty of 1820, Art. II.)

The treaty of 1830 was substituted for that of 1820, in respect of the grant, mainly because of a fault in the boundaries named in the earlier treaty.

(*United States* v. *Choctaw, etc., Nations*, 179 U. S., 494, 508.)

And in the treaty of 1830 the words "and their descendants" were used in a connection distinct from the grant, in palpable reference to the members of the tribe from time to time, viz, in Article IV of that treaty, which guarantees to the Choctaw Nation "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of red people and their descendants." It thus appears that the treaty which was the immediate basis of the patent of 1842 regarded such language as a proper and natural designation for the tribal members in the future.

5. Decisions already made by this court put the matter at rest.

In *Stephens* v. *Cherokee Nation* (174 U. S., 445) Mr. Chief Justice Fuller said that—

> The mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of reexamination by a higher court, though subsequently authorized by general law to exercise jurisdiction. (p. 478.)

Also—

> But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms. (p. 488.)

In *Cherokee Nation* v. *Hitchcock* (187 U. S. 294, 307) it was said:

> Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.

And the decision in this case that Congress could authorize the Secretary of the Interior to lease oil lands belonging to the tribe was of course inconsistent with the claim of private ownership by individual Indians.

The tribal ownership is also emphatically maintained in *Lone Wolf* v. *Hitchcock* (187 U. S., 553; 564, 567, 568).

In *Choctaw Nation* v. *Journeycake* (155 U. S., 196), it was said:

> Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was

> conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees or in any of them. (p. 207.)

See also *Cherokee Trust Funds* (117 U. S., 288); *New York Indians* v. *United States* (170 U. S., 1).

6. Following the above cases, the Circuit Court of Appeals for the Eighth Circuit has very recently decided the exact question of the present case concerning the tribal or individual proprietorship of these Choctaw and Chickasaw lands in *Ligon* v. *Johnston* (164 Fed., 670).

IV.

We come now to the effect and validity of the congressional legislation, supplemented by the Indian agreements of April 23, 1897, and March 21, 1902, for allotment and other distribution of the tribal lands and property of the Choctaws and Chickasaws.

Perhaps the case might stop with the ascertainment that complainants have no individual property rights in the tribal lands, because the bill is based entirely upon the theory that the congressional legislation and all things done thereunder violate such individual property rights. It is not even alleged in the bill that complainants are citizens of the tribe; and if complainants are not citizens, their interest in the situation ends as soon as it is decided that they have no private rights.

As complainants incidentally charge, however, that there was fraud or irregularity in the course of enrollment of Indian citizens, with the result that they were not enrolled, they may conceivably assert that, even

if the congressional legislation is valid, they wish the courts to proclaim them citizens of the tribes and to give them accordingly the benefit of the congressional legislation; and so it will be proper to consider how complainants stand with reference to such claims.

First, *as to the effect* of the statute for allotment, etc., upon the claim of persons whom the Dawes Commission, the Citizenship Court, and finally the Secretary of the Interior have refused to list as citizens. *That effect is to show conclusively in the courts and everywhere that those persons are not entitled to be regarded as citizens or to share in the distribution of the tribal property. Congress has made the rolls of citizens as finally approved by the Secretary of the Interior the ultimate and exclusive test of Indian citizenship.*

Many parts of the statutes show this result. The act of June 10, 1896, provides:

> That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled. * * * That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination

of the United States courts, as provided herein. The commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities.

The act of June 28, 1898, provides in section 21:

> The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

The act of March 3, 1901, provides:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or either of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

Beside the finality of the Secretary's rolls as to the right of citizenship, *the statutes emphatically declare that nobody but a person enrolled or listed as a citizen*

shall be entitled to share in the distribution of the tribal property. Thus—

Section 11 of the act of June 28, 1898, says:

> That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, etc.

Section 11 of the agreement of March 21, 1902, as ratified by the act of July 1, 1902, provides that:

> There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres, etc.

Section 23 of this agreement reads:

> Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent

hereunder shall not be controlled by the writ or process of any court.

Section 24 reads:

> Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.

Section 30 provides:

> For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided.

Section 35 reads:

> No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement.

The act of April 26, 1906, declares in section 27:

> That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for.

Legislative language could hardly be clearer, either on the point that after closure of the rolls those only shall be citizens of the tribe who have actually been enrolled, or on the point that the privilege of participation in the tribal property is given exclusively to those enrolled by the Secretary of the Interior as citizens. (We have nothing to do with freedmen in the present case.)

This court has already said, in a case where it was sought to mandamus the Secretary of the Interior to allow an allotment to an applicant not enrolled:

> The approval of the Secretary required by the agreement must include as one of its elements the recognition of the applicant's right. If a mere outsider were to make a claim, it would have to be rejected by some one, and the Secretary is the natural if not the only person to do it. No list or authentic determination of the parties entitled is referred to by the agreement, so as to narrow the Secretary's duty to identification or questions of

descent in case of subsequent death. The right is conferred upon the members of the bands, but the ascertainment of membership is left wholly at large. No criteria of adoption are stated. The Secretary must have authority to decide on membership in a doubtful case, and if he has it in any case he has it in all. Furthermore, as his decision is not a matter of any particular form, his answer saying that he has decided the case is enough; for even if he had not decided it before, such an answer would announce a decision sufficiently by itself. * * *

We doubt if Congress meant to open an appeal to the courts in all cases where an applicant is dissatisfied. Of course the promise of the United States that there shall be allotted 160 acres to each member of the Wichita band may be said to confer an absolute right upon every actual member of the band. But some one must decide who the members are. We already have expressed the opinion that the primary decision must come from the Secretary. There is no indication of an intent to let applicants go farther. (*West* v. *Hitchcock*, 205 U. S., 80, on pp. 84, 86.)

Note.—In the *Cherokee Intermarriage Cases* (203 U. S., 76) the Secretary of the Interior referred the question of the right of enrollment to the Court of Claims, and there was a special act of Congress giving the Court of Claims and Supreme Court jurisdiction. (See p. 77.)

Of the validity of the system of legislation here involved no opportunity for doubt remains. It is

settled by this court. (*Stephens* v. *Cherokee Nation*, 174 U. S., 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S., 294; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553; *Wallace* v. *Adams*, 204 U. S., 415; *Garfield* v. *Goldsby*, 211 U. S., 249; *Morris* v. *Hitchcock*, 194 U. S., 384.)

These cases show that the right to Indian citizenship is wholly dependent upon the action, and subject to the control, of the proper legislative body of the tribe or of Congress. Therefore Congress may (as the tribe might) determine or condition citizenship by any test which it should see fit to establish. Indeed, it is indisputable that Congress could at any time extinguish the Indian national existence and citizenship altogether. There can be no vested right in such citizenship.

The doctrine is stated thus by Mr. Justice Brewer:

> This decision established that no such vested right was created by the proceedings of the Dawes Commission or the judgments of the courts of the Indian Territory on appeal from the findings of the commission as prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory, it could try another. The fact that the first provision was by an inquiry in a territorial court did not exhaust the power of Congress or preclude further investigation. The functions of the

territorial courts in this respect were but little more than those of a commission. (*Wallace* v. *Adams, supra*, p. 423.)

Hence it was held in that case that a judgment of the United States court for Indian Territory, rendered on appeal from the Dawes Commission and holding appellant entitled to enrollment as a citizen, could be set aside by the new Citizenship Court created by Congress, for the purpose of reviewing such judgments, though the judgment so annulled was final and conclusive but for the new legislation.

In *Cherokee Nation* v. *Hitchcock, supra*, Mr. Justice White said:

> It results then from the doctrine of the decisions of this court that the demurrer was properly sustained, because of the fact that the matters named in the bill were matters of administration, to which the act of June 28 was applicable, and they were solely cognizable by the executive department of the Government. The decision in *Stephens* v. *Cherokee Nation* (174 U. S., 445) is particularly in point, as that case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted

power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed. Thus, in the course of its opinion, after alluding to the legislation concerning the Dawes Commission, the court said:

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

The holding that Congress had power to provide a method for determining membership in the Five Civilized Tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal

> property productive, and secure therefrom an income for the benefit of the tribe. (pp. 306, 307.)

Indeed it has been directly held that Indian citizenship can be destroyed by act of the Indian legislature. (*Roff* v. *Burney*, 168 U. S., 218.)

Further, apart from the political power of the Indian nation and of Congress over Indian citizenship, Congress could provide for distribution of the Indian tribal property as it might choose, and no individual Indian (whether or not actually a citizen of the tribe) could object or interfere. This follows from two things, each sufficient basis for it:

(1) The ownership of the Indian land being purely tribal as we have seen, and no individual Indian having any private right or estate in it, the property could be wholly taken away from the tribe without any private right being violated. *A fortiori* the privilege of participating in allotment or distribution of the tribal land could be conditioned upon actual success in procuring enrollment as a citizen by the Secretary of the Interior; and no individual Indian, though properly a citizen, could overturn the legislation because he had failed of enrollment and so was unable to bring himself within the designated class of distributees.

(2) The tribal title itself was only for the national life, and was subject to reversion upon extinction of that life. This would probably be true upon general principles, but it is made unmistakable by that clause

of the treaty of 1830 and of the patent of 1842 reading: "To enure to them while they shall exist as a nation and live on it." Congress, then, by extinguishing the Indian national existence, as any day it might do, could resume the tribal land. *A fortiori* it could distribute or allot those lands to such of the Indians at it might see fit. Hence, again, it could make actual enrollment by the Secretary of the Interior a final and exclusive test of the right of any Indian to share in such lands or their proceeds.

V.

Courts have no power to vest any complainant herein with the right, which the Indian treaties and acts of Congress do not give him, of being considered or treated as a citizen of the tribe or of sharing in the distribution of the tribal property when in fact he has not been enrolled as a citizen by the Secretary of the Interior. Such enrollment is made by the treaties and the statutes an absolute condition both of Indian citizenship and of participation in tribal property.

The courts can not supply the lack of the enrollment, because—

1. The question of Indian citizenship is a political question which the tribe or Congress can determine and has determined for itself finally and exclusively.

2. The privilege of sharing in the tribal or national property of the Indians rests and may properly rest on the basis of citizenship as determined exclusively by the tribe or by Congress through its own agencies.

3. The entire question as to the right of any particular Indian to share in the distribution of the tribal property is whether he brings himself within the terms

on which the bounty of Congress is offered. The privilege of sharing in the distribution is a pure bounty, because the particular Indian has no private right to it. Congress, beside the tribe in its treaties with the United States, has conditioned that bounty on the Indian's being actually enrolled as a citizen—not by the courts, but by the Secretary of the Interior in final review of other congressional agents, viz, the Dawes Commission, the United States Court for Indian Territory, and the Citizenship Court. Neither the Circuit Court nor any other court can waive or alter such condition imposed by Congress upon the right to share, because courts can not alter the terms of the congressional bounty.

In all these special ways the question of the right of an Indian to be enrolled or listed is political and not judicial.

It would seem to be true, indeed, that if the Circuit Court had in this case undertaken to pronounce complainants Choctaw or Chickasaw citizens, and so entitled to an allotment or other share in the tribal property, Congress still, despite such decision, could cancel the citizenship or withdraw the privilege of allotment, at least if no allotment had yet been made. Before actual allotment there could not be a vested right of property, or anything more than the status of a citizen with its attendant expectancies. All those things belonged to the Indians whose judgments in the United States Court for Indian Territory for enrollment as citizens were held to be voidable

by the Citizenship Court as an agency of Congress created for the purpose of reviewing such judgments, after they had become final and unappealable. (*Wallace* v. *Adams*, *supra*.)

Why could not a judgment by the Circuit Court in this case, holding complainants entitled to be enrolled and treated as Indian citizens, be set aside by Congress or by a new agency of Congress created for the purpose of reviewing it after it had become otherwise unassailable, just as well as like judgments of the United States Court in the Indian Territory could be set aside by the new Citizenship Court? The same reason applies to support both results, viz, that there is no vested right in Indian citizenship and its attendant expectancies under the Indian allotment legislation. The Indians enrolled as citizens by the United States Court for Indian Territory and stricken off the roll by the Citizenship Court, as shown in the Stephens case, *supra*, had the same expectancies of allotment and other distributive share of the tribal property as complainants would have if enrolled by the Circuit Court or this court.

The merely political nature of the question whether complainants shall be given distributive rights as citizens of the Indian tribes has already been declared by this court. (*Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 565; *Wallace* v. *Adams*, 204 U. S., 415,. 423.) And such is the view of the Circuit Court of Appeals for the Eighth Circuit. (*Wallace* v. *Adams*, 143 Fed., 716,723; *Ligon* v. *Johnston*, 164 Fed., 670.)

VI.

The bill does not even allege that complainants were or are citizens of the Choctaw or Chickasaw tribe, and that omission is fatal.

The only claim is that complainants were "all persons of Choctaw or Chickasaw Indian blood and descent, and members of a designated class of persons for whose exclusive use and benefit a special grant was made by letters patent from the President of the United States on February 23, 1842" (Rec., 1, 3, 9). This allegation by no means shows a right to citizenship. If complainants ever were citizens, they may have ceased to be through removal from the tribe, abandonment, disregard of regulations, forfeiture for misconduct, special or general legislative exclusion, or in other ways.

Complainants' ground of attack in their bill is really not alleged citizenship, but supposed private proprietary right in the Indian lands, independent of citizenship.

VII.

Neither the Choctaw and Chickasaw Nation nor the United States is made a party to the case; though one or the other is a necessary party, whether the case be considered as a claim of private ownership of the entire Indian lands and their proceeds by complainants as descendants of the Choctaws of 1831 (Rec., 2), or as a claim that complainants are properly citizens, and as such seek to prevent misappropriation of the tribal property and to recover such tribal property as they aver to have been already misappropriated.

In the first aspect of the case the controversy is over the ownership of the Indian lands and their proceeds between complainants as a special class of

Indians and, on the other hand, the whole Choctaw and Chickasaw tribe or the United States (as one or the other of these holds the title if complainants do not). Such controversy can not be adjudged in the absence of both the Indian nation and the United States from the case. (*Louisiana* v. *Garfield*, 211 U. S., 70).

In the second aspect, the primary right of action belongs to the Indian nation or the United States, and complainants can not enforce that right of action because (1) complainants do not sue for all citizens of the tribe or for the tribe itself, but merely for their own limited class of descendants of the Choctaws of 1831; and (2) complainants do not allege any effort whatever to get the Indian nation or the United States to sue, or any refusal by either of them to sue.

Further, so far as the bill seeks to regain what the United States itself has received from the tribe, the United States itself is, of course, a necessary party.

VIII.

The charges of fraud or irregularity on the part of the enrolling agencies of Congress are altogether irrelevant.

1. As already argued, the Indian treaties and the legislation of Congress make it indispensable to the right either of being recognized as an Indian citizen or of sharing in the distribution of tribal property that the claimant shall have been actually enrolled as a citizen by the Secretary of the Interior. Fraud might be material to undo an enrollment actually made by the Secretary; but fraud, inducing a refusal

to enroll, can not create an actual enrollment which has not been made by the Secretary. The omission of the Secretary to list complainants as citizens can no more be supplied by the courts because such omission has resulted from fraud than if the inaction had resulted in any other way.

This is not a proceeding to compel the Secretary of the Interior by mandamus or otherwise to reconsider claims of complainants to citizenship. It is an attempt to get the courts to do what the Secretary of the Interior, under the acts of Congress, alone could do but has not done. It makes no difference why he has not done it, so far as this case goes.

If complainants at this time have any moral claims for recognition as Choctaws or Chickasaws their appeal must be to Congress, which alone has the right to entertain those claims since the final closure of the citizenship rolls on March 4, 1907. (Act of April 26, 1906, sec. 2.)

2. The asserted fraud or irregularity is also immaterial because complainants do not assert in their bill that they are rightful citizens of the tribe. They fail to aver the fact which their omission from the citizenship rolls by the Secretary of the Interior denies.

3. The specific claim of the bill that the Indian agreements of April 23, 1897, and July 1, 1902, were not regularly ratified by the tribe is unimportant because Congress had full power to pass the statutes which it did, without Indian consent. (*Lone Wolf* v. *Hitchcock*, 187 U. S., 553.)

IX.

Considered in detail, the claims of fraud and irregularity will be found ill pleaded or immaterial or both.

1. The chief charge is that certain members of the Citizenship Court were bribed. No time or place is specified (Rec., 9). It is not averred that the decision of the Citizenship Court would have been other than it was in reference to complainants but for the bribery. The whole allegation is on information and belief.

It is not alleged that such bribery affected Fleming; nor which of the 13,000 "for and on behalf of" whom Fleming sues were affected. The allegation is merely that "many" of the 13,000 were affected (Rec., 8).

It is not alleged when the asserted bribery was discovered or why complainants did not bring the fact to the attention of the Secretary of the Interior, with whom rested the final approval of the rolls.

It is not alleged how the bribery of the Citizenship Court could have influenced the decision of the Secretary of the Interior himself.

2. The charge, that the "great majority of complainants" (Rec., 9) were denied enrollment because "no person could be enrolled as such whose right to enrollment was not recognized by the tribal officials, or whose name did not appear on some one of a half dozen incomplete rolls and parts of rolls of the tribes, which have never been approved or confirmed by the tribal authorities" (Rec., 9), is that the enrolling officers considered facts or customs which they were entitled to weigh.

3. It was likewise permissible for the enrolling officers to consider, at least as an evidential fact, that complainants "had not made an application to the said Commission for enrollment as citizens by blood under said act approved June 28, 1898." (Rec., 10.) Also, the act of April 26, 1906, provides that "after the approval of this act no person shall be enrolled * * * unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application." (Sec. 1.)

4. The "more than 80 rolls of the Choctaws and Chickasaws" which are alleged to have been neglected by the enrolling officers were of course not binding on the commission or the Secretary of the Interior. It was proper to weigh them. Complainants allege of these rolls only that they were "reasonably accurate and complete" (Rec., 10); the names upon them were often merely of alleged ancestors of complainants (ib.); and the opinion of an Assistant Attorney-General, to which complainants refer, is alleged to have said that enrollment should be given to "all persons whose names *rightfully* appeared on any tribal roll and their descendants." (Rec., 10.)

5. The alleged erroneous enrollment of others than complainants does not entitle complainants to enrollment. (Rec., 11.)

6. The alleged misconduct of Beall, an employee of the Dawes Commission, in passing upon applications

against which he had prepared the case in the employ of counsel for the Indian Nation, is not averred to have included any of complainants' cases (Rec., 11); it is not shown to have influenced the Commission (ib.), and it is not shown to have improperly affected the Secretary of the Interior's final action. (Ib.)

7. The alleged suppression or removal of papers is not shown to have secreted material evidence or to have influenced the final outcome before the Secretary of the Interior. (Rec., 12.)

8. It is alleged that the Secretary of the Interior during the week before March 4, 1907, acted upon "2,023 cases involving the rights of upward of 10,000 claimants," and "that during said week he gave no consideration in fact to said 2,023 cases whatever, and that the cases of many complainants were among said cases." (Rec., 12.) If so, the Secretary presumably relied upon the work and recommendation of others in his Department. It would be strange if he could not, as well as disastrous. In *De Cambra* v. *Rogers* (189 U. S., 119), where it was charged that the Secretary, without reading the evidence in a contested case, had simply signed a report prepared for him by a clerk in the Department, this court said: "It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination." (p. 122.)

The whole claim of fraud is utterly vague, general, uncertain, and unworthy of serious treatment.

CONCLUSION.

The writ of error to the Circuit Court should be dismissed for lack of jurisdiction; otherwise, the judgment below should be affirmed.

LLOYD W. BOWERS,
Solicitor-General.

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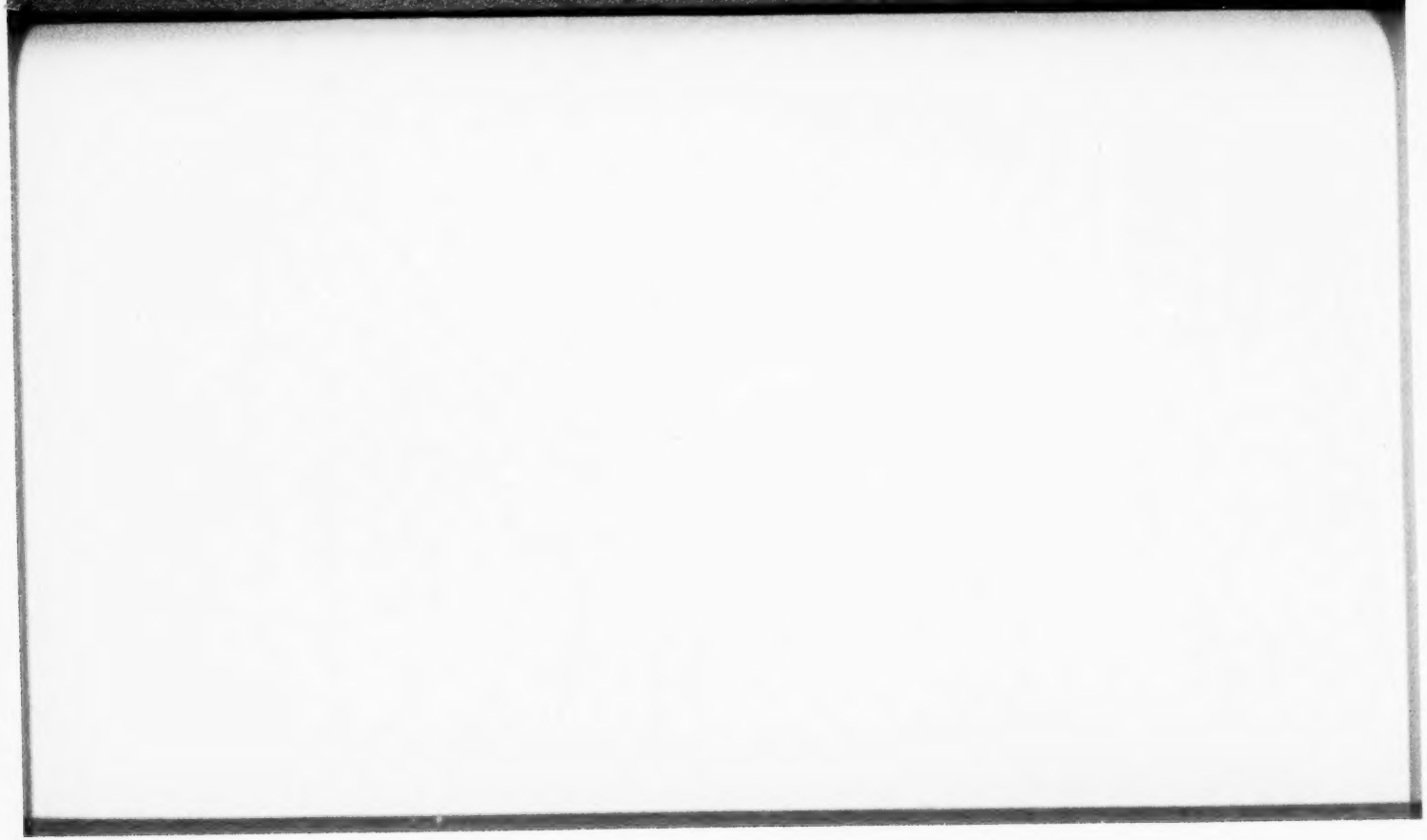

SUPREME COURT, U. S.
FILED
OCT 23 1909
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

J. E. FLEMING, ET AL.,
Appellants,

vs.

GREEN MCCURTAIN, DOUGLAS H. JOHNSTON AND GEORGE MANSFIELD, ET AL.,
Appellees.

No. 258.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

SUPPLEMENTAL BRIEF FOR APPELLEE, GREEN MCCURTAIN.

DAVID C. MCCURTAIN,
EDWARD P. HILL,
Attorneys for Appellee, Green McCurtain.

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

J. E. FLEMING, ET AL.,
Appellants,

vs.

GREEN MCCURTAIN, DOUGLAS H. JOHNSTON, AND GEORGE MANSFIELD, ET AL.,
Appellees.

No. 253.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

SUPPLEMENTAL BRIEF FOR APPELLEE, GREEN McCURTAIN.

STATEMENT.

In our original brief in this case we took the position that the judgments of the Choctaw-Chickasaw Citizenship Court were conclusive and not subject to review by any other court, and that Congress was the only forum possessing

jurisdiction to remedy any mistake or wrong committed by that court. However, if this Court should determine that allegations of fraud are sufficient to reopen the judgments of a Court of exclusive jurisdiction, and to give to the Circuit Court jurisdiction to vacate the judgments of the Citizenship Court, the manner in which those allegations of fraud have been alleged in the petition of the appellants in the Court below becomes a matter for very serious consideration. For that reason we have reached the conclusion that it would be advisable to file a supplemental brief on behalf of Green McCurtain and others, pointing out certain features in which the petition of the complainants is materially insufficient in its allegations.

Specifications of Error in the Complainants' Petition.

1. There are no specific allegations in the petition setting out the fact that the complainants in this case were ever parties to any suits in the United States Territorial Court. While they do allege that there were 4,000 claimants before that Court, there is nothing in the petition to indicate with certainty that any of the appellants in this case were parties to those suits or citizens of the Choctaw or Chickasaw nations at the time the decisions of the Territorial Court were rendered.

2. There are no allegations in the petition which disclose with any degree of certainty the fact that the appellants in this case were ever parties to the suit in the Choctaw-Chickasaw Citizenship Court in which judgment was rendered setting aside the judgments of the United States Territorial Court, or were ever before that Court for the purpose of establishing their right *de novo* to citizenship.

3. The allegations of the petition do not set out with sufficient clearness and particularity the fact that the alleged bribery of the judges of the Citizenship Court resulted in the determination of the questions before it contrary to law and in consequence of such bribery.

4. The allegations of the petition do not set out the fact that the bribery of said judges was unknown to the appellants at the time the judgment of said Citizenship Court was rendered.

5. The allegations of said petition do not set out the fact that the bribery of said judges was concealed from said complainants and that the suit was brought within a reasonable time after its discovery.

6. The allegations of the petition do not set out the time when the bribery of said judges was discovered.

7. The allegations of the petition do not set out the fact that due diligence has been used to detect the bribery of said judges, and that by the use of reasonable diligence the said bribery could not have been discovered sooner.

8. The allegations of the petition do not set out with sufficient certainty or clearness the facts and circumstances connected with the discovery of the bribery of said judges, or the manner in which the discovery of such bribery was made.

9. Neither do the allegations of the petition nor the prayer for relief ask the Court to set aside, vacate, or annul the judgment of the Choctaw-Chickasaw Citizenship Court which held the judgments of the United States Territorial Court to be invalid.

The allegations of the petition clearly show, on the face of the petition itself, negligence and laches on the part of the complainants in the institution of this suit.

ARGUMENT.

Questions Involved.

There can be no question that the real point upon which the appellants rely to secure the relief prayed for in their petition, in the Court below, is the charge of bribery preferred against the three judges of the Citizenship Court. It

is true that they have also alleged the deception of committees and individual members of Congress and the Commission to the Five Civilized Tribes by false and fraudulent representations made to them by the attorneys for the Choctaw and Chickasaw Nations; but in view of the decisions of this Court in the cases of Fletcher vs. Peck (6 Cranch., 87), Lone Wolf vs. Hitchcock (187 U. S., 555), and the Cherokee Intermarriage Cases (203 U. S., 76), we do not believe that it is necessary to seriously consider these allegations.

Fraud, however, in every aspect is always a very serious charge and ofttimes one of the most difficult to meet or refute, and for that very reason the courts have always required the greatest certainty in the specifications of the charge; in fact, almost in as much detail as would be required in setting out the same facts in a criminal indictment.

On January 15, 1903, judgment was entered and certified to the Dawes Commission by the Citizenship Court annulling the judgments of the United States Territorial Court, upon the ground that notice should have been served on both Nations and upon the further ground that the Territorial Court erred in considering the cases *de novo* instead of reviewing the action of the Dawes Commission on the evidence submitted to it.

The petition in this case was not filed in the United States Court for the Eastern District of Oklahoma until January 28, 1908, over five years and a half after the judgment of the Citizenship Court had been rendered, and about fifteen months after the final rolls of the Choctaw Nation had been closed by the Secretary of the Interior in compliance with the requirements of the act of April 26, 1906 (34 Stat., 137), and after the greater part of the Choctaw-Chickasaw lands had been allotted and patented to the individual members of the tribe, as admitted by the alle-

gations of the complainants' petition. The effect of the allowance of the prayer for relief found in the complainants' petition would be to practically unsettle the entire business interest of that large and important part of the State of Oklahoma known as the lands of the Choctaw and Chickasaw Nations; and if the acts attacked by the petition should be declared invalid it would disturb and unsettle the business relations of the entire territory formerly known as the Indian Territory. The effect would in fact be so far reaching and stupendous that the Court might well hesitate to grant the relief prayed, upon the ground that it would create great loss and damage to a vast number of innocent parties.

In fact, a few months after the judgment had been rendered by the Citizenship Court, this Court upon a petition for a writ of prohibition and for certiorari against that Court, alleging that an error of law had been committed, declined to issue the writ upon the ground that the case had been already decided, and in its opinion said:

> "It is correctly stated by the answer that the act does not empower the Citizenship Court to do anything in the test case beyond rendering its judgment and certifying the same, as it has done. This being so, there is nothing which this court could prohibit, even if it were of opinion that the petitioner made out a good case on the merits, which we do not intimate. Therefore the writ must be denied."
>
> (*Ex parte* Joins, 191 U. S., 93-102.)

The case of Joins, it will be noticed, is identical in its facts with the case at bar, the only difference being that the Joins case was brought upon specifications of error in the decision of a question of law, while in the case at bar the complainants have alleged fraud on the part of the judges of the Citizenship Court, knowledge of which, in the

absence of allegations in the petition to the contrary, must be presumed to have been in the possession of the complainants at the time the judgment was rendered by the Citizenship Court, and is therefore barred by limitation,*

Therefore, in view of these facts, we take the liberty of calling to the attention of the court a number of authorities upon the important question of laches, & limitation.

Laches.

Laches is defined to be "unreasonable delay; or the neglect to do at the proper time what by law or duty ought to be done; or the failure to prosecute a claim within a proper and reasonable period." (Abbott's, Bouvier's and Anderson's Law Dictionaries.) The question, however, of what constitutes laches is one to be determined by the Court in the exercise of its sound discretion. As this Court said in the case of Brown vs. County of Buena Vista (95 U. S., 157, 161): "The power of a Court of equity to relieve against a judgment, upon the ground of fraud in a proceeding had directly for that purpose, is well settled." (P. 159.) Further on the Court said: "The statute could run only from the time of the discovery. But a Court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the Court. Sullivan vs. Portland & Kennebec Railroad Co., 94 U. S., 806."

This case was afterwards cited with approval by Mr. Justice Harlan in the case of Richards vs. Mackall (124 U. S., 183-189), where it was held that a complainant who has been guilty of apparent laches in commencing his suit should have set forth in his bill the impediments to an earlier prosecution, the cause of his ignorance of his rights,

* Wilson's Statutes of Okla., 1903, Sec. 4216, p. 973.

and the time when the knowledge first came into his possession; that otherwise, if it should appear upon the hearing that the case was liable to the objection of laches, relief would be refused on that ground.

While there has been no plea or answer set up by the defendants in this case charging laches in the Court below, all of the authorities are practically unanimous in holding that laches may be taken advantage of upon demurrer to a bill or petition, and that it is incumbent upon the complainant to set out in his bill or petition the facts upon which he relies to establish his right to institute the suit.

All of the facts constituting the fraud must be alleged by full, clear, and distinct statements, and must be sufficient to constitute a good excuse against laches (Naddo vs. Bardon, 51 Fed. Rep., 493; Mackall vs. Casilear, 137 U. S., 556). No mere generality of statement will meet the requirements (Badger vs. Badger, 2 Cliff. U. S., 137; McQuiddy vs. Ware, 20 Wall., 19). The plaintiff must also allege why he remained so long in ignorance, and what means were used to prevent him from discovering the fraud sooner. He must in fact acquit himself of all knowledge of facts which would have put him on inquiry; and he must allege positively and distinctly how and when knowledge of the matter first came into his possession. (Hardt vs. Heidweyer, 152 U. S., 547; Godden vs. Kimmell, 99 U. S., 201; Marsh vs. Whitmore, 21 Wall., 178; Jones vs. Perkins, 76 Fed. Rep., 82). It has been the common practice of Courts of equity to dismiss bills where the plaintiffs have been guilty of laches, and no sufficient excuse for their failure to act sooner has been alleged or shown. (Walker vs. Ray, 111 Ill., 315; Gibboney vs. Kent, 82 Va., 383; Abraham vs. Ordway, 158 U. S., 416; Wagner vs. Baird 7 How., 234; Harwood vs. Cincinnati, etc., Air-Line R. Co., 17 Wall., 78; Hayward vs. National Bank, 96 U. S., 611.)

Conclusion.

In conclusion, the attention of the Court is again called to the fact that the allegations of the petition were entirely insufficient to have put the defendans upon their inquiry and to have given them sufficient information as to the facts constituting the fraud to enable them to establish their defense, although the evidence may have been at hand to set up a complete defense to the charges of fraud presented by insinuation and inuendo in the petition. However, had the allegations of fraud been sufficient in form and substance the Court below could still have taken no jurisdiction of the case, as the petition presented no prayer or request to vacate or annul the judgment of the Citizenship Court, and was therefore merely a collateral attack upon said judgment which Courts have uniformly refused to consider.

(Am. & Eng. Ency. of L., 2d Ed., Vol. 17, P. 1042, and numerous authorities cited.)

THE CHOCTAW TITLE SIMILAR TO OTHER INDIAN TITLE.

STATEMENT.

In the original brief filed in this cause on behalf of the appellee, Green McCurtain, we gave a brief history of the source of the title of the property owned by the Choctaw and Chickasaw Nations and now in process of administration and division among its members. We endeavored to show that the source of all Indian titles in the Indians is founded in the ancient right of occupancy in common of the particular tribes, using a defined territory, and that the United States, having succeeded to the government of Great Britain, became vested with the ultimate fee in the soil of all territory occupied by the Indians and with exclusive right to extinguish the Indian title.

We also treated at some length the proposition so vigorously contended for by the appellants, that the words in the Choctaw grant "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," conferred an individual vested right in the lands, and endeavored to show that it undoubtedly meant a grant in common and a grant to the nation, subject to its disposal by the nation with the consent of the United States, or its distribution among the members of the nation only with the consent of the United States, and as showing the construction put upon this grant by both the Indians and the Government, we cited various treaties subsequent to the one of 1830, and many acts of Congres, providing for a distribution of this property and confirming this view.

As further explaining the interpretation placed upon the language in the Treaty of 1830 and the patent of 1842 by the Indians themselves and the Government, we submit the following as showing that at the time of their removal West it was clearly understood by both parties to the treaty that it involved a mere change of occupancy and possession, conferring no greater title or involving no change in the relationship of the parties to each other, and that by this transaction the United States in no wise abridged its power or control over the Indians or their property, and that the paramount authority of the Government covered the newly acquired lands as completely as it had the ceded lands east of the Mississippi.

ARGUMENT.

The Choctaw Tribe of Indians from time immemorial possessed, according to the usual Indian title, by occupation, a large territory in the State of Mississippi. While the title of the Indians has always been held by the Supreme Court to be a right of occupancy only, with the

fee in the United States, at a very early date it was also held that their title was one which should be respected by the courts until extinguished by proper authority. (Fletcher vs. Peck, 6 Cranch., 142; Johnson vs. McIntosh, 8 Wheat., 543.)

More recently it has been declared by the Supreme Court that the right of occupancy by the Indians should be respected until they have abandoned or voluntarily ceded their lands to the United States, or to individuals with the consent and approval of the Government; and that the habits and customs of Indians and their means of securing a living should be considered, and the conclusion was reached that their hunting grounds were as much in their actual possession as the cultivated fields of the white man, and that their right to their exclusive use, in their own way, should be as much respected until abandoned, ceded to the Government, or sold to individuals with the approval of the Government, and that their right of occupancy was as sacred to them as the fee to the Government. (Mitchell vs. United States, 9 Pet., 711; Clark vs. Smith, 13 Pet., 195; United States vs. Cook, 19 Wall., 591; Cherokee Nation vs. Georgia, 5 Pet., 1; Beecher vs. Wetherby, 95 U. S., 517; United States vs. Kagama, 118 U. S., 37.)

Keeping in mind the status, the relation of the Choctaw Indians to the Government, and the character of their title to the lands occupied by them in Mississippi prior to their removal to the lands now in controversy, an examination of the treaty entered into between the Government and this tribe of Indians on September 27, 1830 (7 Stat., 333; Kappler's Laws and Treaties, 2nd Edition, Vol. II, 310), and the patent executed by the President on March 23, 1842 (Recorded Vol. I, p. 43, Gen. Land Office), in pursuance of and as contemplated in the treaty of 1830, will disclose the fact that both parties, the Indians and the

Government, understood that these transactions provided merely for an *exchange* of the lands, the newly acquired lands to be held by exactly the same title as the lands surrendered, and under the same paramount authority of the Government of the United States. This policy of the Government was intended to operate to the advantage both of the Indians and the white people living in the State of Mississippi, as is explained in the preamble to the treaty of 1830, as follows:

> "Whereas the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he can not protect the Choctaw people from the operation of these laws. Now, therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed," etc.

Article II provides that:

> "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning," etc.

Article III provides that:

> "In consideration of the provisions contained in the several articles of this Treaty, the Choctaw Nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree to remove beyond

the Mississippi River, early as practicable, and will so arrange their removal, that as many as possible of their people not exceeding one-half of the whole number, shall depart during the falls of 1831 and 1832; the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government, to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes."

Article IV provides:

"The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs."

Succeeding articles of the Treaty show that all the while the Nation is looked to and they are treated as a tribe.

Let us now revert to the first treaty entered into between the Government and the Choctaws on January 3, 1786 (7 Stat., 21; Kappler's Laws and Treaties, Vol. II, 2nd Edition, p. 11).

Article III provides that:

> "The boundary of the lands hereby allotted to the Choctaw Nation to live and hunt on, within the limits of the United States of America, is and shall be the following,"

The lands described in this treaty are the lands occupied by them east of the Mississippi River, and under the provisions just quoted were *allotted* to the Choctaws to live and hunt on.

The next treaty between the Government and the Choctaws was entered into on December 17, 1801 (7 Stat., 66; Kappler's Laws and Treaties, Vol. II, 2nd Edition, p. 56).

In Article I of this treaty is a recitation that "the Choctaw Nation, or such part of it as may reside within the limits of the United States, shall be and continue under the care and protection of the said States."

Article III provides for a survey of the boundary line between the settlements of the Mississippi Territory and the Choctaw Nation.

The next treaty between the Government and the Choctaws was made October 17, 1802 (7 Stat., 73; Kappler's Laws and Treaties, Vol. II, 2nd Edition, p. 63).

Article I of this treaty provides for re-marking the boundaries of the Choctaw Nation east of the Mississippi River; and by

Article II the Choctaw Nation releases and quit claims for a consideration of one dollar, a part of the lands formerly allotted to them.

The next treaty was made August 31, 1803 (7 Stat., 80; Kappler's Laws and Treaties, Vol. 2, 2nd Edition, p. 69), and had further reference to their boundary lines.

The next treaty, that of November 16, 1805 (7 Stat., 98; Kappler's Laws and Treaties, Vol. II, 2nd Edition, p. 87), was a cession of certain lands to the United States, and a confirmation of a former grant.

The next treaty, October 24, 1816 (7 Stat. 152; Kappler's Laws and Treaties, Vol. II, 2nd Edition, p. 137), was another cession of a part of the land used by them to the United States.

The next treaty is important as bearing upon the suggestion that both the Government and the Indians understood, when they were finally removed to the lands west of the Mississippi River, that there was nothing more than an exchange of lands, the new lands to be held and possessed just as were the surrendered lands, and under the same paramount authority of the United States.

This treaty was entered into October 18, 1820 (7 Stat., 210; Kappler's Laws and Treaties, Vol. II, 2nd Edition, p. 191).

The objects of this treaty are set forth in the preamble, which is as follows:

> "Whereas it is an important object with the President of the United States, to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a Nation, by exchanging, for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together. And whereas it is desirable to the State of Mississippi, to obtain a small part of the land belonging to said Nation; for the mutual accommodation of the parties, and for securing the happiness and protection of the whole Choctaw Nation, as well as preserving that harmony and friendship which so happily subsists between them and the United States," etc.

The treaty then describes the land ceded by the Choctaw Nation to the United States, and the lands ceded by the United States to the Choctaw Nation, the latter being the same land involved in this case.

Afterwards it was discovered that a part of this land ceded to the Choctaws by the United States embraced a large number of settlers, citizens of the United States, and a readjustment of the boundary lines being desirable, a new treaty was made by virtue of which the Choctaws ceded to the United States the land so occupied. Otherwise the treaty remained practically the same. This treaty was made January 20, 1825 (7 Stat., 234; Kappler's Laws and Treaties, Vol. II, 2nd Edition, p. 211).

This brings us down to the treaty of 1830, by virtue of which the patent of 1842 was issued, and complainants contend vested rights were granted to those individuals who were members of the tribe at the date of its ratification, and that the descendants of such individuals succeeded to the lands by descent.

The foregoing treaties, which represent the dealings between the Choctaws and the Government, manifest a desire and deliberate purpose on the part of Congress to convey to the Choctaws lands west of the Mississippi River, to be held by the same title as the lands had been held by them east of the Mississippi River. It was a mere change of occupancy and possession to perpetuate the Choctaw Nation, and as shown by the various treaties leading up to it, deemed desirable by both the Government and the Indians.

The word "exchange," as used in the treaty of 1820, has a well defined legal meaning. Blackstone, in his Commentaries, says:

> "The estates exchanged must be equal in quantity, not of value, for that is immaterial, but of *interest*;—as fee simple for fee simple, a lease for twenty years

for a lease for twenty years, and the like." (2 Bl. Com., 323, and cases cited in the notes. See also 7 Barb., 638; 21 Wis., 123.)

After the treaty, the Choctaw Nation removed to Indian Territory and settled thereon, and have continued to reside there ever since, holding their tribal lands by the ordinary Indian title with the assent of the United States and under their authority.

After the removal of the Choctaws west, they held by exactly the same title and under precisely the same administrative power of the United States as when they occupied their eastern lands, and the laws governing Indian tribes generally, and the decisions of the courts upon the plenary power and control of Congress over Indian tribes applied to the Choctaw Nation with exactly the same force and effect.

Respectfully submitted,

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